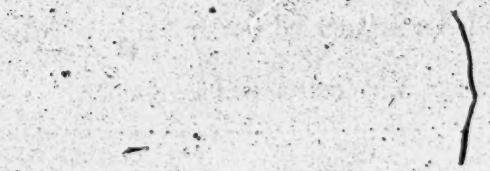
TABLE OF CONTENTS

	PAGE
Decision and Order of National Labor Relations Board	1
Opinion of Boyd Leedom	34
Opinion of Philip Ray Rodgers	35
Intermediate Report and Recommended Order (1957)	44
Intermediate Report and Recommended Order (1959)	86
Supplemental Report and Recommended Order (1959)	101
Second Supplemental Report and Recommended Order (1962)	234



UNITED STATES OF AMERICA

BEFORE THE

National Labor Relations Board

DARLINGTON MANUFACTURING COMPANY, ROGER MILLIKEN, DEERING, MILLIKEN & CO., INC. and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO	Case No. 11-CA-1071

DECISION AND ORDER

On April 30, 1957, Trial Examiner Lloyd Buchanan issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent Darlington Manufacturing Company, herein referred to as "Darlington," had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter the General Counsel, Darlington and the Charging Union filed exceptions to the Intermediate Report and supporting briefs. Darlington and the Charging Union also filed reply briefs, and Darlington requested oral argument. On September 16, 1957, the Board heard oral argument in which the General Counsel, Darlington and the Charging Union participated.

On December 16, 1957, the Board issued an order remanding the case to the Trial Examiner for the purpose of taking "evidence with respect to the single employer status of Respondent and related corporations." Pursuant

to this order and after issuance of a complaint against the affiliated corporations, and Roger Milliken as an individual, a further hearing was held before Trial Examiner Buchanan. On December 31, 1959 the Trial Examiner issued his Supplemental Intermediate Report, a copy of which is attached hereto, finding that Darlington and the related corporations, herein referred to as "Deering-Milliken" did not occupy the status of a single employer. Thereafter the General Counsel and the Charging Union filed exceptions to the Supplemental Intermediate Report and supporting briefs. Darlington and Deering-Milliken filed a brief in support of the Supplemental Intermediate Report.[1]

During the hearing on remand the Trial Examiner had dismissed the complaint as to Roger Milliken. On October 22, 1958, the Board affirmed the dismissal "upon the sole ground that the amendment of the complaint to the extent that it included Roger Milliken as an individual Respondent went beyond the permissible scope of the Board's Remand Order of December 16, 1957." On December 31, 1958, the Regional Director issued a complaint against Roger Milliken alleging that Roger Milliken personally, and by and with Respondent Darlington and Respondent Deering-Milliken, committed unfair labor practices. On the same day the General Counsel moved to consolidate the complaint against Respondent Roger Milliken with the prior complaint against Respondent Darlington. On March 11, 1959, the Board denied the motion to consolidate the complaints. On April 9, 1959, a hearing was held before Trial Examiner Buchanan upon the complaint as to Roger Milliken and on April 30, 1959, the Trial Examiner issued an Intermediate Report, a copy of which is attached hereto, recommending dismissal of that complaint. Excep-

[1]The Charging Union also requested oral argument as to this portion of the case. This request is hereby denied as the record, including the briefs, adequately presents the issues and positions of the parties.

tions and briefs were filed by the General Counsel, the Charging Union, and the Respondent, Roger Milliken.

On January 11, 1961, the Charging Union filed a motion requesting that the Board remand the case to the Trial Examiner for the purpose of taking newly discovered evidence. On February 15, 1961, the Board granted the motion. On April 3, 1961, Deering-Milliken filed a complaint in the District Court for the Middle District of North Carolina requesting that the remand be enjoined and the case returned to the Board. On April 28, 1961, the District Court granted the requested relief.[2] On October 13, 1961, the Court of Appeals for the Fourth Circuit modified the order of the District Court to permit a limited remand of the case to the Trial Examiner.[3] On February 5, 1962, a hearing was held pursuant to the remand permitted by the Court and on March 23, 1962, the Trial Examiner issued his Second Supplemental Intermediate Report, a copy of which is attached hereto. Exceptions and briefs were filed by the General Counsel and the Charging Union and the Respondent Deering-Milliken filed a brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearings and finds that no prejudicial error was committed.[4] The rulings are hereby affirmed. The Board has considered the Intermediate Reports, the Supplemental Intermediate Reports, the exceptions and

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[2] 193 F. Supp. 741.

[3] 295 F. 2d 856.

[4] For the purpose of the first hearing, involving the liability of Darlington Manufacturing Company, the Union obtained subpoenas directed to various parties not respondents in this case. Upon petitions duly filed the Trial Examiner revoked the Union's subpoenas. The Union has excepted to the Trial Examiner's revocations of the subpoenas, but, in its brief, the Union conditioned the exception upon a Board finding that the Respondent's closing of its plant was not caused by the employees' selection of the Union as their bargaining representative. In view of the findings hereinafter made, the Union's exception to the Trial Examiner's revocations of the subpoenas is deemed to be withdrawn.

briefs, the oral argument, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner insofar as they are consistent with this Decision and Order.[5]

In March 1956 the Charging Union initiated an organizational campaign among Darlington's employees that culminated in a Board conducted election on September 6, 1956, which was won by the Union. Throughout the campaign Darlington's supervisors interrogated employees as to their union activities[6] and made threatening statements to the employees because of those activities.[7] At the same time Darlington was also engaged in an extensive plant improvement program.[8] The day after the Union won the election Roger Milliken, Darlington's president, decided that he would recommend to Darlington's directors and stockholders that they close the plant. He testified:

> I felt that as a result of the campaign that had been conducted and the promises and statements made in these letters that had been distributed [by the Union], that if we had had some possible hope of achieving competitive . . . [costs] . . . by taking advantage of new machinery that was being put in, that this hope had diminished as a result of the election because a majority of the employees had voted in favor of the union.

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[5]The General Counsel and the Union have excepted to the Trial Examiner's handling of various documents submitted as evidence at the first hearing. In some instances the Trial Examiner admitted the documents as evidence, in others he excluded them. In view of the findings hereinafter reached, the Trial Examiner's rulings on the admissibility of the disputed documents were not prejudicial.

[6]The record contains evidence of about 20 such instances of interrogation.

[7]There is evidence of about 30 threats made to employees during the period of the organizational campaign.

[8]From 1952 through 1956 the Respondent authorized about $723,000 for capital expenditures; of that sum approximately $400,000 was actually spent between January 1956 and September 1956.

Milliken thereupon called a special meeting of Darlington's board of directors to be held on September 12, although ordinarily ten days to two weeks written notice was given for directors' meetings. The directors subsequently met in a session that lasted only about 75 minutes; they resolved to liquidate Darlington and to call a special meeting of stockholders to approve the proposal. Also on September 12 the Union asked Darlington for a bargaining conference but was told to wait until after it was certified by the Board.[9]

The stockholders met on October 17 to consider a resolution which recited that the directors were recommending dissolution of the corporation because of "certain developments" that related to Darlington's operations. General Manager Oeland testified that Milliken identified the "certain developments" as " . . . the recent election where the majority of the people in the plant . . . [were] . . . for the Union . . ."[10] South Carolina State Senator Mozingo, who was present at the stockholders' meeting, gave uncontradicted testimony that Milliken opened the meeting with the statement "that on September 6, when [the employees] voted for a union that he decided to close the mill." The stockholders approved the resolution to liquidate. Senator Mozingo testified, also without contradiction, that he had the following conversation with Milliken after the meeting:

> ". . . he said, 'Well, you will probably get another industry herein Darlington,' and I said, 'How do you

[9]On the same day Darlington filed objections to the conduct of the election. The Regional Director, on October 8, issued a report on objections recommending that they be overruled and the Union be certified. Darlington did not file exceptions and the Board issued a certification to the Union on October 24, 1956.

[10]For the period following the directors' meeting, the record contains evidence of about 25 statements by supervisors to employees to the general effect that the Union's election victory was responsible for the closing of the plant and would result in the blacklisting of the employees in their search for new jobs. There is also evidence that on 8 occasions supervisors tried to convince employees to support a petition that was circulating among them to disavow the Union.

> expect us to get another industry when you are leaving a s[t]igma on us here that can't be erased . . . Not only that, it is unfair because eighty-three percent of these people I am told have signed a petition to go back to work . . .' he said, 'As long as there are seventeen percent of the hard core crowd[11] here, I refuse to run the mill."

Darlington had accepted no new orders from customers after the directors' meeting on September 12 but continued to operate the plant to fill the orders at hand. The Charging Union's representatives did meet with Darlington's officials on November 7 and requested certain wage information, which Darlington never supplied. Darlington discontinued productive operations on November 24 and sold the plant machinery and equipment at auction on December 12 and 13, 1956.

The 8(a)(1) violations

The Trial Examiner found that Darlington violated Section 8(a)(1) of the Act by (a) interrogation of employees with respect to their activities in behalf of the Union, (b) statements (made before the representation election) that Darlington would close the plant if the employees selected the Union as their bargaining agent, (c) statements (made after the directors' special meeting) that connected the decision to close the plant with the employees' activities in behalf of the Union, and (d) encouragement of employees to sign the petition disavowing the Union that circulated after the election. The Trial Examiner did not set forth all the evidence supporting these findings. It is sufficient to state, however, that the evidence is overwhelming and, to a large

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[11]The witness subsequently elaborated on the "hard core crowd" and reported Milliken's expression as "hard core labor people."

extent, uncontradicted.[12] Accordingly, we adopt the foregoing findings made by the Trial Examiner.[13]

The 8(a)(3) violation

One of the major issues in this case was raised by Darlington's contention that, as an employer, it had an absolute right "to go out of business for whatever reason it may choose, and regardless of whether union animosity may have contributed to the decision." However, Darlington has not relied exclusively upon this contention as a defense to the charge that it violated Section 8(a)(3).

Darlington also advanced a more conventional defense to the Section 8(a)(3) charge; it claimed that the shutdown of its mill was due to economic and financial factors. In its brief (at pages 15 through 24) Darlington has listed 8 so-called "economic" factors that assertedly caused it to shut

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[12]Darlington has not seriously challenged the Trial Examiner's Section 8(a)(1) findings. At page 48 of its brief in support of exceptions, the Respondent has stated: "With respondent's corporate existence at an end, it seems particularly unrewarding to debate whether these circumstances constituted a violation of the Act. Reference is made to these [8(a)(1)] findings here only because of the manifest unfairness of assessing the company with liability for such acts and words of supervisors in the turbulent days following the announcement that the mill would close. To direct that respondent publish a notice that it will desist from further 'interfering' of this kind is both futile and absurd."

[13]We do not pass upon any of the 8(a)(1) violations alleged besides those that the Trial Examiner found were supported by the record, because in the particular circumstances of this case any additional findings of 8(a)(1) violations would be merely cumulative. Moreover, we do not adopt, or pass upon, the Trial Examiner's findings that: (1) unlawful statements made by Darlington's supervisors did not reflect declarations by Roger Milliken; (2) a supervisor's request that an employee keep him informed of employees' union activities and the surveillance of such activities by the supervisor are not unlawful; (3) the supervisors' unlawful threats were not proof of such threats by Roger Milliken; (4) certain posters posted by Darlington did not constitute unlawful interference or threats; and (5) Darlington did not instigate circulation of the petition disavowing the Union.

the plant. Six of them fit the traditional concept of "economic" factors. The remaining 2 asserted "economic" factors pertaining to the employees' union activities; one of them was termed "The TWUA Election." When an employer discharges its employees for selecting a union to represent them, the motivation is not "economic" in the sense contemplated by the Act—notwithstanding the employer's belief that it could not afford to pay increased wages that the union representative might demand.[14] The overall effect of Darlington's listing of the 8 so-called "economic" factors is an admission that the employees' union activities were, in part, the cause of its decision to close the mill.[15]

The Trial Examiner rejected Darlington's claim that all 8 factors contributed to Darlington's decision to close the mill; he found that Darlington's decision to shut the plant "would not have been made but for the protected organizational activities" of the employees. We agree. If Darlington's general behavior during the months that preceded the election did not reflect actual confidence in its business future, it established, at the very least, the intention to continue as an operating concern. The 6 truly economic factors were problems that had faced Darlington over an extended period, and Darlington's plant improvement program was specifically designed to overcome such problems. That program involved an expenditure of $400,000 in the 9-month period preceding the election. Just one month before the directors' special dissolution meeting, general manager Oeland reported a projected $40,000 loss to President Milliken, yet, despite such a serious and unpromising economic forecast, Milliken took no action to slow up the modernization program in any way. It was not until the employees

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[14] *Industrial Fabricating, Inc., et al,* 119 NLRB 162.

[15] Darlington has stated, at page 23 of its brief, that ". . . the election was responsible for the decision to call the meeting at which it was decided to recommend liquidation to the stockholders. . . ."

selected the Union as their bargaining representative that Darlington's attitude towards its operations changed. With the election, the renovation program was discontinued; the directors met as soon after the election as was possible for them; the directors' special meeting lasted just over an hour —barely time for the directors to itemize, much less to discuss, the 6 asserted economic factors that caused the plant closing. After the directors' meeting Darlington's supervisors told the employees that the election was the cause of the mill shutdown; and, at the stockholders' dissolution meeting, Milliken specifically stated that he decided to close the mill when the employees selected the Union as their bargaining agent.

Moreover, even assuming, as the Respondent contends, that the 6 genuine economic factors as well as the employees' union activities were responsible for the closing of the mill, Darlington's action was no less unlawful.[16] A plant shutdown resulting in the discharge of employees that is partly due to employees' union activities constitutes an unfair labor practice.[17]

At this point we reach the fundamental issue noted above—whether an employer has the absolute right to go

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[16]Contrary to Darlington, *Mount Hope Finishing Company* v. *N. L. R. B.*, 211 F. 2d 365 (C. A. 4) is irrelevant here. The Court specifically found therein that the employer's removal of a plant did not violate the Act because the employees' union activities merely accentuated the employer's pre-existing lawful reasons for moving its plant and that the employer's move of its plant was motivated by factors apart from its employees' union activity. Darlington has, itself, distinguished this case from *Mount Hope* by conceding that the closing of its plant was partly attributable tot he employees' selection of the Union.

[17]*N. L. R. B.* v. *Jamestown Sterling Corp.*, 211 F. 2d 725, 726 (C. A. 2), wherein the Court stated, "If employees are discharged partly because of their participation in a campaign to establish a union and partly because of some neglect or delinquency, there is nonetheless a violation of the National Labor Relations Act. . . ." See also *N. L. R. B.* v. *Whitin Machine Works*, 204 F. 2d 803, 805 (C. A. 1).

out of business even if its reason for doing so is its employees' union activities. Section 8(a)(3) provides:

> It shall be an unfair labor practice for an employer —by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

Darlington discriminated in regard to its employees' tenure of employment by closing its plant—thereby discharging the employees—and, because the plant closing was the direct result of the employees' selection of the Charging Union as their collective bargaining representative, Darlington's retaliation against the employees for their activities in behalf of the Union discouraged the employees' continued membership in the Union.[18] Notwithstanding this uncomplicated, literal violation of Section 8(a)(3) established by its conduct, Darlington contends its action was not unlawful.

The Respondent has advanced several arguments to support its contention. The Respondent claims, first, that the South Carolina statutes under which it was incorporated gave it the "absolute right voluntarily to liquidate."[19] If the South Carolina Code did contain such a right, it could prevail only if not in conflict with the National Labor Relations Act.[20] But it is unnecessary to resolve whether

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[18] *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Associated Press* v. *N. L. R. B.*, 301 U. S. 103.

[19] Code of Laws of South Carolina, Section 12-641 (1952) provides that, "All corporations incorporated in this State . . . shall always have the right to go into liquidation and to wind up their affairs and dissolve by resolution of the stockholders representing a majority of capital stock . . ."

[20] *Garner, et al., t/a Central Storage and Transfer Company* v. *Teamsters, Chauffeurs and Helpers Local Union No. 776 (A. F. L.)*, 346 U. S. 485, 500-501. "We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure . . ." And see *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468.

there is a conflict between the South Carolina and the federal statutes; the South Carolina Code did not give Darlington the absolute, unlimited right to liquidate that it claimed. The Code, considered in its entirety, provides, contrary to Darlington, that, in the event of a corporate dissolution, the corporate entity survives for the very purpose of continuing the legal obligations that the corporation incurred before the dissolution or in the course of dissolution.[21]

Darlington's second argument is that the shutting of the mill "effectively and finally terminated" the existing employer-employee relationship, and that, thereafter, it was no longer an employer within the meaning of the Act.[22] The Act does not state the specific characteristics of an "employer." The Act does, however, state that "The term 'employee' shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice . . ." Darlington's discharged workers remained employees within the statutory definition, and their employment rela-

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[21]Code of Laws of South Carolina, Section 12-644 (1952) provides that any corporate dissolution under Section 12-641 (the provision relied upon by Darlington). ". . . shall not bar an action for two years thereafter against any corporation or any of its members . . ." And Section 12-601 provides that "All corporations [that are dissolved] shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them . . ."

[22]This argument cannot apply to the discharges that Darlington effected before its last day of production on November 24, 1956, because Darlington has otherwise conceded that an employer does "not escape liability for unfair labor practices committed while it was still in business." The Respondent discharged its employees over a 6 weeks period. Thus on October 13 it had about 510 employees, on October 20 about 460 employees, on October 27 about 345 employees, and so on until November 24 when the Respondent discharged the last of its employees. Inasmuch as the Respondent was an employer with a working staff of employees up until the date it fired the last group of employees, even under the Respondent's contention, the employees fired before November 24 were discriminatorily discharged.

tionship vis-a-vis their employer did not terminate.[23] Moreover, Darlington did not dissolve into nothingness at the time it discontinued production operations on November 24. It continued to exist as a corporate entity under the laws of South Carolina; it liquidated fixed assets at auction in December 1956; it has been distributing funds to its stockholders; and it has been vigorously defending this proceeding before the Board.

Darlington also argued that the Board and the Courts, in deciding National Labor Relations Act cases, have established an employer's absolute right to go out of business.[24] All but one of the cases the Respondent relies upon to support this proposition are irrelevant or actually contrary to Darlington. Darlington has cited *Seaboard Packing Company*, 107 NLRB 1295, but in that case the Board adopted an Intermediate Report that stated" . . . the evidence does not . . . establish that the Respondent closed down [its plant] and locked out its employees to avoid dealing with the Union." Darlington advanced these pronouncements to support its position.

> "The stockholders of Tupelo Garment Co., had the absolute right to dissolve their corporation and the Board was without authority to prevent this." *N. L. R. B.* v. *Tupelo Garment Company*, 122 F. 2d 603, 606 (C.A. 5).
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> ". . . a bona fide shutdown of a plant does not of itself constitute a violation of the Act . . ." *Atlas Underwear Company* v. *N. L. R. B.*, 116 F. 2d 1020 1023 (C. A. 6).

Examination of these two cases shows that the citations were taken out of context. *Tupelo*, a contempt case, in-

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[23] See *Phelps Dodge Corporation* v. *N. L. R. B.*, 313 U. S. 177, 190-191.

[24] Darlington has conceded that Board and Court decisions establish violations of Section 8(a)(3) by employers that move or temporarily close their plants because of anti-union considerations.

volved the issue whether newly organized corporations were successors to the respondent; there was no issue of the respondent's right to go out of business. The quotation from the *Atlas* case is taken from the context of the decision in *N.L.R.B.* v. *Asheville Hosiery Co.*, 108 F. 2d 288 (C. A. 4), in which the Fourth Circuit stated more fully at page 293:

> . . . while a bona fide shutdown of a plant does not constitute a violation of the Act, a shutdown not made in good faith, and intended to discourage unionization is illegal.

There is one decision that, at first glance, lends considerable support to Darlington's claim that it could shut its plant for discriminatory reasons. In view of its importance to Darlington's defense, we recite at this point the entire portion of that decision on which Darlington has relied. In *N. L. R. B.* v. *New Madrid Co., d/b/a Jones Mfg. Co.*, 215 F. 2d 908, 914 (C. A. 8), the Eighth Circuit said:

> But none of this can be taken to mean that an employer does not have the absolute right, at all times, to permanently close and go out of business, or to actually dispose of his business to another, for whatever reason he may choose, whether union animosity or anything else, and without his being thereby left subject to a remedial liability under the Labor Management Relations Act for such unfair labor practices as he may have committed in the enterprise, except up to the time that such actual and permanent closing or true and bona fide change in ownership has occurred. No one can be required to stay in private business, and no one can be prevented from permanently closing or abdicatingly selling such a business. And the Act affords no basis on which to order a person to reinstate employees in a business which he has, with plain finality, put out of existence, or which he has actually disposed of to another,

> and as to which he neither in law nor in fact possesses any power over the operations of his successor, either of management right in general or of labor-relations control in particular. Cf. *Southport Petroleum Co.* v. *N. L. R. B.*, 315 U. S. 100, 106. No more, in our opinion, can the Act be said to contain any basis to assess remedial back-pay against such a person, beyond the date of his permanent closing or abdicating sale of the enterprise.

Reference to the entire decision in the *New Madrid* case shows that the Court agreed with the Board's findings that New Madrid's shutdown of a plant violated Section 8(a) (1), (3) and (5) of the Act. The Court overruled, however, the Board's finding that New Madrid's subsequent sale of the plant failed to rescind New Madrid's actual control over it. The Eighth Circuit also rejected the Board's conclusion that New Madrid and its successor (Jones) were jointly liable for correction of the unfair labor practices that New Madrid, alone, had committed before the plant sale. In thus reversing the Board, the Court noted that New Madrid had decided not to reopen the plant after an audit showing that the plant had lost money. The Court commented that in some circumstances a successor to a business is liable for the unfair labor practices of his vendor and followed with the above-recited paragraph, which cut off New Madrid's responsibility for remedying the unfair labor practices at the point of the plant sale. The Court went on to hold successor Jones liable for the reinstatement of the employees that New Madrid had discriminatorily discharged.

Accordingly, the legal conclusions that the Court reached were contrary to the court's *obiter dictum* that an employer can permanently close a business "for whatever reason he may choose, whether union animosity or anything else." The Court found that New Madrid's mill shutdown with its concomitant discharge of employees violated Section 8(a)

(3) of the Act. Indeed, the Court issued an order requiring the reinstatement of the discharged employees; such reinstatement order could be made only in the case of unlawful discharge. Moreover, Darlington's interpretation of the Eighth Circuit's decision attributes to the Court the overruling of its own earlier decisions,[25] even though the statutory right of an employer to close a plant permanently was not in issue and was not briefed by any party. In the circumstances we are loath to accept the Respondent's interpretation of the Circuit Court's intendment in the *New Madrid* case. We view the above-quoted paragraph as part of the Court's concern with the remedy in a case wherein the Court otherwise found that New Madrid, in a bona fide transaction, sold its plant to Jones. In any event, if Darlington has correctly interpreted the Court's meaning, we respectfully disagree.

There is no decided case directly dispositive of Darlington's claim that it had an absolute right to close its mill, irrespective of motive. We are convinced, however, that relevant Board and Court decisions reject Darlington's view. It has been decided by the Supreme Court, for example, that an employer violated Section 8(3) of the Act by the wholesale discharge of all the employees on its boat because they were members of a particular union.[26] In a

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[25] See, for example, *N.L.R.B.* v. *National Garment Company, et al,* 166 F. 2d 233 (C. A. 8), wherein the Court, in rejecting the Respondent's argument that the discharge of all its employees was not discrimination, stated at page 238, "They discriminated against all employees by treating them differently than they would have treated them had some of them not joined the union within the plain intendment of Section 7 and 8(1)(3). . ."; *Williams Motor Company* v. *N. L. R. B.,* 128 F. 2d 960 (C. A. 8), wherein the Eighth Circuit found that an employer's permanent discontinuance of a department violated Section 8(3).

[26] *N. L. R. B.* v. *Waterman Steamship Corporation,* 309 U. S. 206. The Court stated at page 219, "And employees . . . have a right guaranteed by the Act that they will not be dismissed because of affiliation with a particular union."

case very similar on its facts to the instant case the Fourth Circuit found that an employer violated Section 8(a)(1) and (3) by shutting its mine after threatening to do so because of his employees' union activities.[27] In another instance the Third Circuit held that an employer which closed one of its plants because of opposition to its employees' union activities violated Section 8(a)(1), (3) and (5) of the Act.[28] And the Eighth Circuit upheld a finding that an employer which discontinued one of its departments in retaliation for its employees' activities in behalf of a union violated Section 8(3).[29]

In summary, Section 8(a)(3) literally proscribes Darlington's closing of its business in retaliation for the employees' selection of the Union as their bargaining representative; Darlington has failed to advance any substantial reason for excepting its conduct from the operation of Section 8(a)(3); and, in cases factually similar to this one, employers charged with violating Section 8(a)(3) have been found guilty thereof. In addition, Darlington's conduct was contrary to the fundamental spirit and purpose of the Statute. Darlington's threat to close its mill if the Union became the bargaining representative of its employees is a classical example of a violation of Section 8(a)(1).[30]

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[27] *N. L. R. B.* v. *Norma Mining Corporation, et al.*, 206 F. 2d 38 (C. A. 4); the finding related to respondent Ward. See also *N. L. R. B.* v. *Joseph Stremel d/b/a Crow Bar Coal Company*, 141 F. 2d 317, 318 (C. A. 10), in which the Court said, "A shut-down or lock-out of employees for the purpose of discouraging membership in a labor organization constitutes discrimination within Section 8(3) and (1) of the Act."

[28] *N. L. R. B.* v. *Wallick & Schwalm Company, et al.*, 198 F. 2d 477 (C. A. 3). See also *Town & Country Mfg. Co., Inc.*, 136 NLRB No. 111.

[29] *Williams Motor Company* v. *N. L. R. B.*, 128 F. 2d 960 (C. A. 8).

[30] See, among other cases, *Audubon Cabinet Company, Inc.*, 117 NLRB 861, 863; *J. H. Rutter-Rex Manufacturing Co., Inc.*, 115 NLRB 388, 389.

As noted above, a partial effectuation of Darlington's threat —such as a temporary closing of the mill, or a discharge of some but not all of the employees—would have violated Section 8(a)(3). Yet Darlington would have this Board find that total effectuation of the threat—the permanent closing of its mill with the concomitant discharge of all its personnel—did not violate the Act. In other words, under Darlington's contention an employer with a staff of 100 employees violates Section 8(a)(3) if he discriminatorily fires 50 or 75 or even 99 of his 100 workers, or if he temporarily lays off all of them, but, if he retaliates against them, for their union activities by permanently discharging all of them, the finality of his conduct would make it lawful. The argument is self-defeating.

The preamble of the amended Act provides, in part:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organizations, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

The "policy of the United States" is to mitigate and eliminate obstacles to the free flow of commerce "by encouraging the practice and procedure of collective bargaining" and by protecting workers in the exercise of their right to organize and to select a bargaining representative. On the other hand, Darlington's policy, as evidenced by its conduct, is directly contrary to that prescribed by the Statute. Once the employees had exercised their statutory right of

selecting the Union by the process prescribed by the Statute—the Board election—Darlington destroyed the possibility of collective bargaining by shutting its plant. Darlington is mistaken in its claim that by going out of business and permanently reducing "the free flow of commerce" the Statute made lawful its discharge of employees for their engagement in organizing activities. Congress has taken from employers the right to discharge employees for engaging in protected activities. The withdrawal of this right is absolute and unequivocal.

We find, in conclusion, and for the foregoing reasons that Darlington's closing of the mill, with its concomitant discharge of employees violated Section 8(a)(3) and (1) of the Act.

There is, moreover, independent reason for rejecting the contention that Darlington had an absolute right to close down its mill and discharge its employees. As will appear below, Darlington was but one constituent part of a single entity, consisting of Deering, Milliken and Company and its affiliated corporations. Thus we have here the closing of a single plant of the several in the one entity because of union activity, conduct clearly proscribed by the Act.[21]

The 8(a)(5) violation

The Trial Examiner found that Darlington's violations of Section 8(a)(3) "were so complete as to discourage and ultimately thwart the Union from pursuing its right to bargain" and were a *fortiori* violative of Section 8(a)(5). In his opinion "as it is discriminatory against its employees, so does it constitute a refusal to bargain for an employer, on the basis of a union's campaign propa-

[21] *N. L. R. B.* v. *Norma Mining Corporation*, 206 F. 2d 38, 41-42 (C. A. 4).

ganda, oral and in writing, concerning improved working conditions and greater pay, to anticipate demands and compulsion to grant such demands, and therefore to terminate its operations and avoid bargaining." The Examiner also found that Darlington's refusal to furnish the Union with wage and related bargaining information independently violated Section 8(a)(5).[22] We adopt these findings of the Trial Examiner. We find further that Darlington's refusal to bargain collectively with respect to the employees' tenure of employment was in derogation of the Union's status as the majority representative of the employees.

The Remedy

The Trial Examiner recommended that Darlington cease and desist from committing further unfair labor practices and that Darlington publish notices to that effect in local newspapers. He also recommended, "dependent on resumption of operations," that Darlington bargain collectively with the Union and offer reinstatement to the discriminatorily discharged employees. Although the Trial Examiner found that "an injury cognizable by law has occurred" and that "there can be a decision to compensate" the discriminatees,[23] he did not recommend the payment of back pay to them.

We adopt the Trial Examiner's recommendations as to remedy to the extent that they require Darlington to cease

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[22]In the absence of specific exception we adopt the Trial Examiner's finding that Darlington's initial unlawful refusal to bargain with the Union occurred on September 12, 1956.

We do not adopt the Trial Examiner's finding, in effect, that Darlington's violations of Section 8(a)(1) were not relevant to Darlington's *bona fides* in refusing to bargain with the Union; nor do we adopt his finding that the Union's last request for bargaining information may have been "made with an eye to negotiating with prospective purchasers" of Darlington's plant.

[23]The Examiner otherwise stated, however, that the payment of back pay "would reflect a punitive aspect."

and desist from committing unfair labor practices, require Darlington to post notices in newspapers,[34] and direct Darlington to bargain collectively with the Union and to reinstate the discriminatees in the event Darlington, at some time, recommences operations.[35]

The Trial Examiner refused to require direct mailing of notices to employees, asserting that such a measure would be punitive. We do not agree. Direct mail may be the only way by which some of Darlington's former employees can learn of the Board's Decision and Order in this case, inasmuch as some of them may have left the geographical area covered by the newspapers that will carry the notice. Accordingly, we shall order Darlington to mail copies of the notice to the last known address of each discriminatee.[36]

The Trial Examiner refused to recommend back pay for the approximately 500 employees unlawfully discharged by Darlington because, in his opinion, there was no record proof that Darlington would have continued to operate the plant absent the employees' union activities and because he deemed controlling the Court opinion in the *Mount Hope* case.[37]

We do not agree with the Trial Examiner that it was necessary for the record affirmatively to show that the

[34] In the absence of a permanent plant location where notices can be posted, we find this method of posting proper. *Southland Mfg. Co.*, 94 NLRB 813, 817; *Russell Mfg. Co., Inc., et al.*, 82 NLRB 1081, 1088, enforced in this respect 187 F. 2d 296 (C. A. 5) and 191 F. 2d 358 (C. A. 5). Contrary to Darlington, this form of notice posting is consistent with *N. L. R. B.* v. *Reynolds Corporation*, 155 F. 2d 679 (C. A. 5), wherein the Court refused merely to require posting of notices at a non-operating plant site.

[35] We do not agree, however, with the Trial Examiner's statement that there was "no claim that the sale [of the Respondent's assets] was not to *bona fide* purchasers for value."

[36] *N. L. R. B.* v. *American Laundry Machinery Company*, 152 F. 2d 400, 401 (C. A. 2); *N. L. R. B.* v. *Sunbeam Electric Manufacturing Co.*, 133 F. 2d 856, 861 (C. A. 7).

[37] *Mount Hope Finishing Company* v. *N. L. R. B.*, 211 F. 2d 365 (C. A. 4). The record does not support the Trial Examiner's finding that the "General Counsel and the Union here appear to have accepted the Court's decision" in *Mount Hope*.

Respondent would have continued to operate its plant, absent unlawful motivation, in order to warrant a back pay award. Any uncertainty as to the continued operation of Darlington's plant—based on some reason other than its unlawful retaliation against the employees—is a matter to be determined at the compliance stage of the Board's process. The back pay remedy obtains where there is an unlawful discharge of employees. In the event a respondent liable for back pay has a superseding lawful reason for terminating its back pay liability that respondent has the privilege to establish that fact at the compliance stage of a proceeding. In like manner, the Respondent herein would have the opportunity, if necessary, to reduce its back pay liability by showing that, as of a particular date, it would have closed its plant or laid off some dischargees even if the employees had not voted for the Union.[38] We also find that the Trial Examiner improperly relied upon the Fourth Circuit opinion in *Mount Hope*. The Court reversed, on the merits, a Board finding that the respondent had violated Section 8(a)(3); accordingly, the Court had no remedy to pass upon in *Mount Hope*.

We are convinced that a back pay award is essential in this case to rectify Darlington's fundamental violation of Section 8(a)(3). The Board has wide discretion in directing a back pay award under Section 10(c) of the Act;[39] Darlington's discontinuance of its business does not terminate the Board's authority in this regard.[40] "The mere fact that an employer may cease to do business certainly does not end the public interest involved in seeing that a back-pay award under the Act is satisfied."[41]

[38] In any event the Trial Examiner's finding that the record establishes that Darlington's mill would not have closed but for the employees' union activities gives rise to the presumption that Darlington would have continued to operate the mill absent that union activity.

[39] *Virginia Electric Power Company* v. *N. L. R. B.*, 319 U. S. 533; *Phelps Dodge Corporation* v. *N. L. R. B.*, 313 U. S. 177.

The unusual circumstances of this case, however, have made it more than ordinarily difficult to decide on the period that the back-pay award should cover. The Darlington plant has been closed and there is no immediate prospect that it will be reopened. The Board's remedy of reinstatement with back pay to run until such time as reinstatement has occurred, which is the Board's customary remedy where an employer has discriminatorily discharged his employees, is thus wholly impractical where the closed plant only is taken into consideration. Yet the approximately 500 discharged employees, thrown into the ranks of the unemployed in a very small city,[42] would suffer severally from the closing of the plant. It is reasonable to assume that these employees would have continued in their employment indefinitely, particularly in view of the large sums spent and allocated for modernization of the mill. In order to restore "the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination"[43] we shall therefore order the Respondent, Darlington, to provide back pay until the discharged employees are able to obtain substantially equivalent employment.[44]

[Loss of pay shall be based upon earnings which the employees normally would have earned from the date of the discrimination against them, to the date of their reinstate-

[40] *N. L. R. B.* v. *S. W. Dixon d/b/a U. S. Trailer Manufacturing Company*, 184 F. 2d 521 (C. A. 8), wherein the Court distinguished *N. L. R. B.* v. *Grace Company*, 184 F. 2d (C. A. 8), a case relied upon by Darlington, because, unlike the *Dixon* and instant cases, the *Grace* decision did not involve reimbursement for loss of wages. See also *N. L. R. B.* v. *Caroline Mills, Inc.*, 167 F. 2d 212 (C. A. 5).

[41] *N. L. R. B.* v. *Killoren, etc.*, 122 F. 2d 609 (C. A. 8); see also *Waterman Steamship Corporation* v. *N. L. R. B.*, 119 F. 2d 760, 763 (C. A. 5).

[42] The 1960 census shows that Darlington had a population of 6,710.

[43] *Phelps Dodge Corporation* v. *N. L. R. B.*, 313 U. S. 177, 194.

[44] If, however, the employees are placed on a preferential hiring list at other Deering-Milliken mills, which, as will appear below, occupy a single employer status with Darlington, we shall toll back pay as of the time they are placed on such list.

ment, less net earnings, computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289; *NLRB* v. *Seven-Up Company of Miami, Inc.*, 344 U. S. 344. It will also be recommended that Respondent preserve and, upon request, make available to the Board payroll and other records to facilitate the computation of the backpay due.] (Bracketed material added by Board's supplemental order of November 21, 1962.)

Were Darlington a single entity the remedy above would provide the only practicable solution although this limited redress for the unfair labor practices found is clearly inadequate. The extended supplemental hearings were held in order to determine whether or not Darlington occupied a single employer status with Deering-Milliken and its affiliated corporations. The Trial Examiner found that Darlington did not occupy such a status. We do not agree. It is now well established that for two or more legal entities to constitute a "single employer" for purposes of assessing liability for unfair labor practices it must be shown that there was a sufficient degree of common ownership and common control of labor relations and operations so that it may be said that they are engaged in a common enterprise.[45] In our opinion the evidence fully supports a finding that Darlington and Deering-Milliken and its affiliated corporations meet this test.

The "common ownership" necessary for such a finding is amply demonstrated by the stock ownership shown in the stipulation entered into among the parties. Thus the Milliken family owns, either through direct stock ownership or through ownership of corporations holding stock, at least 66% of the stock of Darlington. In similar fashion the Milliken family owns a majority of the stock of Deering-

[45] *Dearborn Oil and Gas Corporation*, 125 NLRB 645, 647; *Editorial "El Imparcial," Inc.*, 123 NLRB 1585, 1593, enforced 278 F. 2d 184 (C. A. 1); *Combined Century Theatres, Inc.*, 120 NLRB 1379, 1380-1381.

Milliken and Cotwool and from 88% to 55% of all of the affiliated corporations. Such stock ownership clearly satisfies the Board's requirements for a finding of "common ownership."[46]

That "common ownership" here constituted something more than the mere holding of the stock is shown by the identity of the officers and directors elected pursuant to such ownership and their effectuation of corporate changes when the occasion demanded. Thus Roger Milliken was president of all of the corporations except the Lauren Mills. In like vein a majority of the directors of each corporations, with one exception, are members of the Milliken family. And, as illustrated by the merger of the Cotwool and Deering-Milliken, treated more fully in the Supplemental Intermediate Report, the Milliken family could and did eliminate corporate lines where circumstances made such action advantageous. From this evidence we can only conclude the Milliken family had, and exercised, its ownership over all of the corporations which constituted the Deering-Milliken complex.

In the "crucial area" of common control over labor relations,[47] it is likewise clear that the Board's standards are met. Roger Milliken, the president of all of the corporations save one, exercised ultimate control over the labor relations of all of the corporations. Thus he received reports from each of the mills as to progress in reducing the number of jobs, the pay raises given, hours worked and job assignments, was asked for approval of various personnel actions, and made suggestions as to the hiring of personnel. More

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[46] *Ecusta Paper Corporation*, 66 NLRB 1204, 1212; *Calcasieu* Paper Co., Inc., 99 NLRB 794, 802, enforced 203 F. 2d 12 (C. A. 5); cf. *Dunspur Company, Inc.*, 114 NLRB 40, 41-42; *A. M. Andrews Co.*, 112 NLRB 626, 628-629; *Somerset Classics, Inc.*, 90 NLRB 1676, 1688, enforced 193 F. 2d 613 (C. A. 2); *Federal Engineering Co.*, 60 NLRB 592, enforced as modified 153 F. 2d 233 (C. A. 6).

[47] *Dearborn Oil and Gas Corporation, supra; Monsieur Henri Wines, Ltd.*, 44 NLRB 1310, 1314.

important, however, was Roger Milliken's participation in the area having the greatest impact on labor relations—the area of collective bargaining. Thus he circulated a memorandum and editorial which was obviously intended as a primer to the managers of the mills in combatting union organization. During the organizational campaign his pervasive influence was demonstrated by the statements of supervisory employees that Roger Milliken would close the plant rather than permit its unionization. Moreover, it was Roger Milliken who, with the approval of his family, decided to close the plant admittedly because the employees had exercised their rights under the Act and selected the charging party as their representative. And finally it was Roger Milliken who told a stockholder and director that he would not operate the mill so long as there was "seventeen percent of the hard core" labor people remaining in the mill.

From the above evidence, we conclude that Deering-Milliken, primarily through the person of Roger Milliken, exercised control over the labor relations of all of the corporations, including Darlington. Although the details of day-to-day personnel relations may have been, of necessity, conducted at the mills, it is manifest that the major decisions were exclusively in the hands of Roger Milliken. Under such circumstances it is clear that Deering-Milliken must assume responsibility for control of Darlington's labor relations.

There is abundant evidence that Deering-Milliken exercised even tighter control over the operations of the other corporations. It exercised complete control over their sales. The head of Deering-Milliken's Tax Department was an officer of each of the mills and as such supervised all tax matters for the mills. The Tax Department concerned itself with the accounting procedures, vacation plans, incentive compensation contracts for supervisors, and re-

viewed the drafts of minutes of stockholder and directors' meetings. Deering-Milliken's Insurance Department handled all insurance for the mills. Financial reports were rendered by the Sales Department. And other officers of Deering-Milliken also participated in the details of the operations of the other corporations.

Control was also exercised through the Deering-Milliken Service Corporation. Thus the Purchasing Department made all purchases of equipment and machinery for all of the mills. The Cotton Purchasing Department purchased all the cotton used by the mills, specified the proper mix of cotton for the production of particular kinds of cloth, and disposed of waste cotton. The Fiber Quality Control and Research Department advised the mills on the methods of getting the maximum efficiency from raw material, equipment and personnel. The Engineering Department performed similar services with respect to buildings and the physical plant. And the Placement Department oversaw the hiring of supervisory-trainees.

Roger Milliken himself participated fully in the control of the operations of the mills. Regular reports regarding operations were rendered to him. He required the mills to inform him of their capital expenditures and report on their success in job reductions. He, in turn, informed the mills on "policy" with respect to revealing information to competitors and payroll deductions for charitable purposes. The many memoranda emanating from Roger Milliken, were addressed to all of the mills, not to the individual mill. In short, Roger Milliken exercised close control over all of the mills alike in the entire Deering-Milliken group. We are therefore convinced that Deering-Milliken exercised sufficient control over the operations of all of the mills to meet the tests utilized by the Board.

Aside from the evidence set forth above, with respect to the individual factors demonstrating that the Deering-

Milliken group of corporations were one enterprise there is much which persuades us that Deering-Milliken and the corporations so considered themselves. In the many documents which form part of the record in this case repeated references are found to "our organization;" "Deering-Milliken Mills;" "Deering Milliken Group;" and "The Company." In describing movements from one mill to another the word "transfer" was utilized. In the booklet published by Deering-Milliken entitled "Fabric Magic By Milliken" there are repeated references to the "Milliken Mills," the "Milliken Operations," "Mills with Milliken," "Milliken's own industrial engineers," and statements such as "you made the mill grow like this—1865 one mill; now 29 mills." Such references are consistent only with the existence of a single, integrated enterprise.

Although we have thus found that Deering-Milliken and its affiliated corporations, including Darlington, constitute a single employer responsible for the unfair labor practices committed, the question remains as to what remedy is appropriate. As Deering-Milliken and the affiliated corporations occupy a single employer status with Darlington, we shall, of course, make them liable for back pay to the same extent as we have heretofore directed with respect to Darlington. Unlike Darlington, however, Deering-Milliken and the affiliated corporations[48] still exist.

It is therefore possible that even in the event Darlington does not resume its operations so as to enable the discharged employees to be reinstated there, the job rights of these discharged employees may still be afforded a measure of protection. We direct, therefore, that in the event the Darlington plant is not reopened, Deering-Milliken shall offer employment to the discharged employees, if they

[48]Since it appears from the record that Deering, Milliken and Company, Incorporated, was merged with Cotwool Manufacturing Company into a third corporation, Deering, Milliken, Incorporated, we shall make our order also run against the last-named corporation.

desire, in its other mills in South Carolina or adjacent states without prejudice to their seniority and other rights and privileges, to the extent that positions are available in such plants. Available positions shall be distributed among the discharged employees in accordance with Deering-Milliken's usual method of operation under curtailed production, without discrimination against any employee because of union affiliation or activities, following the system of seniority, if any, customarily applied by Deering-Milliken. However, in order not to injure innocent third persons presently employed in the other mills, we shall not require that such persons be dismissed or otherwise prejudiced in order to carry out the reinstatement ordered herein. Any remaining discharged employees for whom no work is available under the foregoing arrangement shall be placed upon a preferential hiring list, and shall thereafter, in accordance with such list, be offered employment in their former or substantially equivalent positions as such employment becomes available and before other persons are hired for such work.[49]

We shall also order the Respondent Deering-Milliken to offer to pay employees the travel and moving expenses entailed in moving their families and household effects to other mills in the event employees accept such offers of reinstatement.[50]

It has been found that the Respondents Darlington and Deering-Milliken violated Sections 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union as the exclusive representative of the employees in the Darlington mills. As we have indicated above in our discussion of the remedial action to be taken by Respondent Darlington, it is impossible for us to accord to the Union the bargaining rights which normally attach to a Board

[49] *Sidele Fashions, Inc.*, 133 NLRB No. 49, enfd. 305 F. 2d 825 (C. A. 3).

[50] *Sidele Fashions, Inc., supra.*

certification unless the Darlington plant is reopened. Absent that contingency, however, we shall partially restore those rights by requiring Respondent Deering-Milliken to bargain with the Union for the purpose of reaching an agreement as to the mode of operation of the preferential hiring lists, and as to the terms and conditions under which the former employees of the Darlington mills may, if they desire, obtain employment at other mills in South Carolina and adjacent states.[51]

With respect to the liability of Roger Milliken, as an individual, we do not believe the charge filed against ". . . Roger Milliken, President . . ." is sufficient to support a complaint against Roger Milliken as an individual. Section 10(b) has long been regarded by the Board and the Courts as a statute of limitations and the test of the sufficiency of a petition to toll the running of such a statute has been stated to be (2 Moore's Federal Practice, 2nd ed., Sec. 4.44, pg. 1042):

> whether on the basis of an objective standard, it is reasonable to conclude that the plaintiff had in mind a particular entity or person, merely made mistake as to the name, and actually served the entity or person intended; or whether plaintiff actually meant to serve and sue a different person.

Here there is no cogent evidence that the Charging Union erred in naming Roger Milliken in his capacity as president of Darlington. The charge clearly names Roger Milliken as president, an office in which he served at the time, and there is no evidence that any other person of this name served the other respondents in any capacity. The charge itself, although filed against two entities and Roger Milliken, President, speaks in the singular of the "employer" and thus does not suggest that Roger Milliken, individually.

[51]Cf. *Brown Truck and Trailer Manufacturing, Inc.*, 106 NLRB 999, 1003.

was regarded as an employer separate and apart from his position as president. The offer of proof by the Charging Union at the first hearing which led to the remand for determination of the single employer status of Darlington and Deering-Milliken also indicates that Roger Milliken was charged, as President, because in that capacity he served as a connecting link between the various corporations. Applying an objective standard we conclude that it was intended to charge Roger Milliken in his representative capacity as President and not as an individual and that the charge will therefore not support the complaint.

ORDER

I. Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondents, Darlington Manufacturing Company, Darlington, South Carolina; Deering, Milliken and Company, Inc., New York, New York; and Deering, Milliken, Incorporated, New York, New York; their officers, agents, successors, and assigns, shall jointly and severally:

1. Cease and desist from:

(a) Refusing to bargain collectively with Textile Workers Union of America, AFL-CIO, as the exclusive representative of all the employees in the unit found appropriate by the Board, with respect to rates of pay, wages, hours of employment, and other conditions of employment.

(b) Discouraging membership in Textile Workers Union of America, AFL-CIO, or in any other labor organization of their employees, by a plant closing and by discharging their employees, or by discriminating in any other manner in respect to their hire and tenure of employment, or any term or condition of employment.

(c) Threatening to close down an operation or to blacklist the employees if they select a union as their collective bargaining representative, interrogating the employees concerning union membership and activities in a manner constituting a violation of Section 8(a)(1) of the Act, supporting a petition disavowing Textile Workers Union of America, AFL-CIO, as the collective bargaining representative of the employees, or ascribing the closing of the plant to the employees' union activities.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Textile Workers Union of America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, in the event that the Respondents resume operations at Darlington, South Carolina, bargain collectively with Textile Workers Union of America, AFL-CIO, as the exclusive representative of the employees in the unit found appropriate by the Board, and embody in a signed agreement any understanding reached.

(b) Make whole all the employees who were on the payroll on October 13, 1956, for any loss of pay suf-

ferred by reason of the discrimination against them, and offer employment to all those employees, in the manner set forth in the section herein entitled "The remedy."

(c) Preserve and, upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary for determination of the amounts of back pay due under the terms of this Order.

(d) Advertise once each week for eight weeks in the "News and Press," Darlington, South Carolina, and in the "Florence Morning News," Florence, South Carolina, and mail to the last-known address of each employee on the payroll on October 13, 1956, copies of the notice attached hereto marked "Appendix A."[52] Copies of such notice shall be furnished by the Regional Director for the Eleventh Region and shall be duly signed by the Respondents' representatives.

(e) Notify the Regional Director for the Eleventh Region, in writing, within 10 days from the date of this Order as to the steps Respondents have taken to comply herewith.

II. Upon the entire record in the case and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondents Deering, Milliken and Company, and Deering, Milliken, Incorporated, shall take the following affirmative action, in addition to that set forth above, which the Board finds will effectuate the policies of the Act:

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[52]If the Board's Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting the words, "A Decree of the United States Court of Appeals Enforcing an Order" for the words "A Decision and Order."

1. Bargain collectively with the Textile Workers Union of America, AFL-CIO, to the extent required, with respect to the reinstatement of their employees in the manner set forth in the section herein entitled "The remedy."

2. Mail to the last-known address of each employee on the payroll of the mill at Darlington, South Carolina, on October 13, 1956, copies of the notice attached hereto marked "Appendix B."[53] Copies of such notice shall be furnished by the Regional Director for the Eleventh Region and shall be duly signed by the Respondents' representatives.

3. Notify the Regional Director for the Eleventh Region, in writing, within 10 days from the date of this Order as to the steps Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that the Board hereby reserves to itself the right to modify the back pay and reinstatement provisions of this Order, if made necessary by circumstances not now apparent.

IT IS FURTHER ORDERED that the complaint against Roger Milliken, as an individual, be, and it hereby is, dismissed.

Dated, Washington, D. C. Oct. 18, 1962.

.....
Frank W. McCulloch, Chairman

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John H. Fanning, Member

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Gerald A. Brown, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[53] See footnote 53, *supra*.

BOYD LEEDOM, MEMBER, concurring in part and dissenting in part:

I agree with my colleagues of the majority in this case, except in two respects.

Unlike them, I would find, in agreement with the Trial Examiner, that Darlington and Deering-Milliken and its affiliated corporations did not occupy a single-employer status and, as Darlington alone engaged in the unfair practices found, I would dismiss the complaint as to the remaining corporate respondents. I believe that no single-employer status exists for the reasons indicated by the Trial Examiner in his Intermediate Report and particularly for the reason that there is here an absence of common ownership within the meaning of the decided cases. Emphasizing this conclusion is the fact that, while members of the Milliken family own stock in all the corporations involved, all such members do not own stock in each of the corporations. It would, in these circumstances, be an extension of the decided cases to hold that there was, in fact, common ownership of these corporations.

I further depart from the majority with respect to the backpay remedy. My colleagues order Darlington to provide backpay from the date of the discrimination found until the discharged employees are able to obtain substantially equivalent employment or are placed on a preferential list. For the reasons stated in *Barbers Iron Foundry,* 126 NLRB 30, and in the main opinion in *M. Yoseph Bag,* 128 NLRB 211, I would award backpay only from the date of the discrimination to the date when the Darlington plant closed.

In all other respects, I concur in the majority decision.

Dated, Washington, D. C. October 18, 1962.

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Boyd Leedom, Member

NATIONAL LABOR RELATIONS BOARD

Opinion of Member Rodgers

PHILIP RAY RODGERS, MEMBER, dissenting:

The principal issue in this case, whether Darlington, Deering-Milliken, and the various other named corporations, constitute a single employer within the meaning of the Act, is not, as the Trial Examiner has fully stated, entirely free from doubt.

However, the burden of proof on this issue rests upon the General Counsel, and like the Trial Examiner, and unlike my colleagues, I am constrained to find that, on the record before us, that burden of proof has not been met.

This conclusion is, I feel, consistent with the Board's holding in the recently issued *Knight Newspapers*[54] case in which it was pointed out by the Board that, notwithstanding the fact of single ownership, [a fact which I might interpolate is open to serious question here] the *potentiality* of common control and integrated operation is not a sufficient basis to support a finding of single employer. I do not believe this case is substantially different, factually, from the newspaper case, in that while there is much to indicate a protentiality of control and integration, the actuality of such elements has not been established.

I would therefore conclude, on the basis of this record, that only Darlington is properly before us in this case. I would dismiss the complaint as to Deering-Milliken and other Respondent Corporations.

Now as to the case against Darlington, I agree with my colleagues insofar as they find a violation of 8(a)(1) based upon the interrogation of employees by the Respondent and the statements made before and after the representation election.

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[54] *Knight Newspapers Inc.*, 138 NLRB No. 137.

Opinion of Member Rodgers

However, as to the finding of the 8(a)(3) violation, and as to the remedy ordered by the majority, I must respectfully disagree.[55]

The question to be resolved with respect to Darlington is the important and fundamental question of whether or not Darlington violated the Act by liquidating its plant and going out of business. My colleagues have found that such a going out of business constitutes a violation of law which must be remedied by this Board. I do not agree.[56] For—constitutional issues aside—there is nothing contained in the basic Act nor in any amendment thereto which limits an employer's right to go out of business at such time and under such circumstances as he chooses.[57] As stated by the

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[55]It goes without saying, of course, that I disagree with so much of the remedial order which is predicated on the majority's finding of "single employer," and the resultant involvement of Deering-Milliken and the other corporations in remedying the unfair labor practices found by them.

[56]I deem it an exercise in semantics to indicate, as some have done, that while it constitutes a violation of law to go out of business, such action constitutes a violation for which no remedial order can issue by virtue of the fact that the Respondent "has gone out of business." Likewise, I deem it an exercise in semantics to say that the law does not interfere with the "right" to go out of business, but that a remedy in behalf of any aggrieved party will attach if the right is exercised. Surely the type of remedy being applied in this class of case, involving, as it does, heavy back pay liabilities which may well run on indefinitely unless the enterprise is reestablished and the employees rehired, is sufficiently harsh to render illusory the existence of, and effectively extinguish the exercise of, any such "right" to go out of business.

[57]While the legislative history of the law reflects no detailed consideration of this point, such comments as can be found indicate that Congress gave no serious consideration to the limiting of so fundamental a right as the employer's right to go out of business. For example, Senator Walsh, Chairman of the Senate Labor Committee, during the debate on the Wagner Act stated: "Mr. President, there are some fundamental rights an employer has, just as there are rights an employee has. *No one can compel an employer to keep his factory open.* No one can compel an employer to pay any particular wage. No one can compel an employer to hire others in addition to those he sees fit to hire. So with an employee; no one can compel him to work, no one can compel him to go on strike, no one can compel him to leave his work.

Court of Appeals in *N. L. R. B.* v. *New Madrid Manufacturing Company and Jones Manufacturing Company:*[58]

> But none of this can be taken to mean that an employer does not have the absolute right, at all times, to permanently close and go out of business, or to actually dispose of his business to another, for whatever reason he may choose, *whether union animosity or anything else,* and without his being thereby left subject to a remedial liability under the Labor Management Relations Act for such unfair labor practices as he may have committed in the enterprise, except up to the time that such actual and permanent closing or true and bona fide change in ownership has occurred. No one can be required to stay in private business, and no one can be prevented from permanently closing or abdicatingly selling such a business. And the Act affords no basis on which to order a person to reinstate employees in a business which he has, with plain finality, put out of existence, or which he has actually disposed of to another, and as to which he neither in law nor in fact possesses any power over the operations of his successor, either of management right in general or of labor-relations control in particular. Cf. *Southport Petroleum Co.*, v. *N. L. R. B.*, 315 U. S. 100, 106, 62 S. Ct. 452, 456, 86 L. Ed. 718, 726. No more, in our opinion, can the

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No one can keep an employer from closing down his factory and putting thousands of men and women on the street. So in dealing with this bill we have to recognize those fundamental things, and we have not gone into that domain. All we do is to remove the barriers that have kept employees away from their employers, which have prevented collective bargaining, which have resulted in strikes without any attempt to negotiate. All we have done is to promote the orderly processes of collective bargaining." [Emphasis supplied.] 79 Cong. Rec.. 7673, 74th Cong., 1st Sess. (1935).

Also, Congressman Griswold, during the House debate on the same bill stated, in answer to a question: *"There is nothing in the bill to keep an operator from closing his plant. * * *"* [Emphasis supplied.] 79 Cong. Rec. 9782, 74th Cong., 1st Sess. (1935).

[58]215 F. 2d 908, 913-914 (C. A. 8).

Act be said to contain any basis to assess remedial back-pay against such a person, beyond the date of his permanent closing *or* abdicating sale of the enterprise. [Emphasis supplied.]

Dated, Washington, D. C. October 18, 1962.

.....

Philip Ray Rogers, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, or in any other labor organization of our employees, by plant closings and discharging our employees or by discriminating in any other manner in respect to their hire and tenure of employment, or any term or condition of employment.

WE WILL NOT threaten to close down a plant or operation, or blacklist our employees, if they select a union as their collective bargaining representative, interrogate our employees concerning union membership or activities in a manner constituting a violation of Section 8(a)(1) of the Act, support a petition disavowing bargaining representative of our employees, or ascribe the closing of our plant or operation to our employees' union activities.

WE WILL NOT in any other manner interefere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an

agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

WE WILL, in the event that we resume operations at Darlington, South Carolina, bargain upon request with TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, as the exclusive representative of our employees in the bargaining unit hereinafter described, with respect to rates of pay, wages, hours of employment, or other conditions of employment, and embody in a signed agreement any understanding reached. The bargaining unit is:

> All production and maintenance employees at Darlington Manufacturing Company's textile plant at Darlington, South Carolina, including firemen, slasher foremen, and supply room clerks, but excluding office clerical employees, professional employees, watchmen, guards, and all supervisors as defined in the Act.

WE WILL make whole all the employees who were on our payroll on October 13, 1956, for any loss of pay suffered as a result of our discrimination against them.

WE WILL, in the event we resume operations at Darlington, South Carolina, offer reinstatement to all employees who were on our payroll on October 13, 1956, without prejudice to their seniority and other rights and privileges.

All our employees are free to become, remain, or to refrain from becoming members in good standing in TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, or in any

other labor organization, except to the extent that such right may be affected by an agreement in conformity with Section 8(a)(3) of the Act.

DARLINGTON MANUFACTURING COMPANY

DEERING, MILLIKEN AND COMPANY, INCORPORATED

DEERING, MILLIKEN, INCORPORATED

Dated ..... By .....
(Representative) (Title)

NOTE: We will notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to reinstatement upon application in accordance with the Selective Service Act after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 1831 Nissen Building, 310 West Fourth Street, Winston-Salem, North Carolina, Tel. No. 724-8356, if they have any question concerning this Notice or compliance with its provisions.

APPENDIX B

NOTICE TO ALL EMPLOYEES
OF DARLINGTON MANUFACTURING COMPANY
PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify the employees of Darlington Manufacturing Company that:

> WE WILL bargain upon request with TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, to the extent required with respect to the mode of operation of a preferential hiring list by which the employees formerly employed by the Darlington Manufacturing Company at Darlington, South Carolina, may obtain employment at other of our mills in South Carolina and adjacent states.

DEERING, MILLIKEN AND COMPANY, INC.
DEERING, MILLIKEN INCORPORATED
(Employers)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 1831 Nissen Building, 310 West Fourth Street, Winston-Salem, North Carolina, Tel. No. 724-8356, if they have any question concerning this Notice or compliance with its provisions.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

DIVISION OF TRIAL EXAMINERS

WASHINGTON, D. C.

DARLINGTON MANUFACTURING COMPANY and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO	Case No. 11-CA-1071

Mr. John M. Dyer, for the General Counsel.

Messrs. Price & Poag, of Greenville, S. C., by *Mr. J. H. Price* and *Mr. J. D. Poag;* and *Mr. Stuart N. Updike* and *Mr. John R. Schoemer, Jr.,* of New York, N. Y., for the Respondent.

Messrs. Townley, Updike, Carter & Rodgers, of New York, N. Y., by *Mr. Stuart N. Updike,* for Deering, Milliken & Co., Inc., and Roger Milliken, its president.

Mr. Thomas A. Wofford, of Greenville, S. C., appearing specially for Deering, Milliken Service Corporation.

Mr. Max Zimny and *Mr. Benjamin Wyle,* of New York, N. Y., and *Mr. Boyd E. Payton* and *Mr. Bruce E. Davis,* of Charlotte, N. C., for the Union.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

BUCHANAN, Trial Examiner: With the closing of the mill, the salient issue in this case is whether such closing and the discharge of employees was discriminatory in violation of Section 8 (a) (3) of the National Labor Relations Act, as amended, 61 Stat. 136. The questions of violation of Section 8 (a) (1) of the Act by interrogation, threats, surveillance, support of a disaffiliation petition, and statements connecting plant closing with the Union victory; and of Section 8 (a) (5) by refusal to bargain have become, relatively, less significant.

This is pointed up by the problem of remedy which must arise with any finding of violation of Section 8 (a) (3). The major problem in the case, however important, interesting, and difficult the other questions involved, is to find an adequate and lawful remedy for discriminatory discharges where the employer has discontinued its operations and sold its plant and equipment. The Company has no other mill or operation and, we are told, does not intend to operate this mill again. Postponing consideration of the question whether the Act was violated,[1] our immediate concern is that, after it is found that violation occurred, the element of continued operation, but for the violation, and the period thereof are left undetermined.

A different aspect is pointed up by the General Counsel's argument, underscored by the Union, that a violator should not be permitted to go scot-free, and that a requirement be imposed of payment into the indefinite future or at least for a limited but fixed period. But this would reflect a punitive aspect which the statute lacks.[2] The prob-

[1] This, of course, was not the order in which the questions have in fact been weighed and determined. But, without minimizing the others, the most difficult problem before us is that of the remedy.

[2] *Consolidated Edison Company*, 305 U. S. 197, 235-236; *Republic Steel Corporation*, 311 U. S. 7, 11-12.

lem is not solved by eloquent arguments which would show that the employees are entitled or are not entitled to continued payment of wages according to some abstract notion of "elementary justice" or on the basis of a sympathetic understanding which may favor one side or the other.

However valiant the efforts, which I welcomed and encouraged so that an effective and lawful remedy might be fixed if violation were found, it has not been established with the certitude or definiteness which the law requires that, but for the discriminatory motive, the plant would still be in operation or that it would have continued in operation in whole or in part to a certain date after operations were in fact terminated. The Board may apply its expertise in determining whether a violation has been committed and also in directing a remedy. But not even expertise can substitute for or provide proof of loss where none is otherwise shown. Neither may we, as we seek to effectuate the policies of the Act, transcend the requirement that the extent of loss be shown at least generally if there is to be a direction to make whole.

Even with respect to those operations which first ceased, in the spinning room, since an inventory of warp yarn had been accumulated for use on wider looms which had been purchased—even as to such operations, while their termination is found to have been discriminatory and part of the overall violation, we cannot say that but for such violation those operations would have continued for any definite additional period.

It follows that, despite a finding of discrimination, there can be no apparently effective remedy: the company is not to be directed to reemploy (except in the event, not now foreseen, that it resumes operations) or to make whole by back pay. One recalls that in other branches the law allows reasonable compensation although opinions may differ as to the amount. For example, reimbursement is permitted

for loss of goodwill and even for loss of profits; in some jurisdictions recovery for the latter may be denied because of the speculative nature of any determination, while in others, a definite basis for recovery being recognized, it is permitted although opinions may differ as to the amount to be allowed. To cite one additional instance, inexact determinations are made in compensating for injuries and suffering in personal injury actions, but only after the general extent of the loss or damage has been ascertained. It can be seen that in such cases there is a fixed basis for the determination even if that basis allows for different evaluations. Where, after the decision to compensate, there is a basis or rule, sometimes inexact in its application, for determining the amount of compensation, the law proceeds further and declares that amount. In the instant case, there can be a decision to compensate; but we have no rule or basis for fixing the amounts. Despite its ability to clear many obstacles, the concept of making whole is too unruly a steed to be allowed to take us in unmarket directions and over uncharted terrain without the restraint of a guiding hand.

It has been urged that we proceed on the assumption that, but for the discrimination, the plant would still be operating, as it had been; and that the remedy be fixed accordingly. Alternatively, that back pay be imposed to cover an additional year's employment. Or, should those proposals be rejected, that compensation be paid for 22 weeks, the period during which unemployment compensation payments are locally made. There is as much basis for adopting one of these proposals as there is for any of the others; but no sufficient basis for any. There is no more basis for directing pay to the date of closing, for those employees who were earlier discharged, between the date of decision to close and the date of closing, as their work ran

out; or supplemental pay for those who worked fewer hours. While the shutdown itself is found to be discriminatory, there is no evidence of discrimination in the manner in which that shutdown was effected. Orderly liquidation calls for progressive shutdown by jobs and departments. Only if a later date for closing were determined could it be shown that those first laid off would have ben employed longer than they were; and in that case a similar finding could be made for the other employees.

In the *Mount Hope* case,[3] reinstatement was directed with back pay "to the date when (the respective employees) normally would have been discharged" absent the discrimination. It was there left for later determination whether economic factors would have dictated later closing and, if so, when. Setting this aside, the Circuit Court commented with respect to the quoted phrase: "How the latter date could possibly have been determined the Board does not venture to say and the record does not indicate."[4] The General Counsel admits that it is "impossible" to direct reinstatement and back pay as if the Company were still operating, in effect to put Humpty Dumpty together again. The Board did not seek review of the Court's decision in the *Mount Hope* case (I draw no conclusion from this), nor has it had occasion to declare itself on this point since that decision. The General Counsel and the Union here appear to have accepted the Court's decision in this connection as, in proposing remedies, they have made an effort to show that the mill would have or should be considered likely to have operated for certain periods beyond the dates when the various operations were successfully terminated.

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[3] *Mount Hope Finishing Company*, 106 NLRB 480, 500.

[4] *N. L. R. B.* v. *Mount Hope Finishing Company*, 211 F. 2d 365, 369 (C. A. 4). (The basis for the reversal of the finding of discrimination in that case, that long before the union made its appearance management was seeking another location, is not here present.)

Since we here seek to make whole, there is no basis for directing reinstatement or payment of lost earnings without the date to which the employees would otherwise have worked and when the plant would otherwise have closed if at all. This brings us back to the *Mount Hope Finishing* case. Neither the arguments nor the proposals submitted to me warrant a back pay order even though, counsel for the Company to the contrary notwithstanding, an "injury cognizable by law has occurred." It seems that this is not a subject for the application of either wit or wisdom in setting a remedy while the case is decided. Whatever ingenuity may accomplish as the Board or the Court may seek to effectuate the policies of the Act, I transmit the case in reliance on existing authority.[5] We leave to other authority the analysis of conditions which prompt and develop from such

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[5]In thus relying on the final decision in the *Mount Hope* case on the question of back pay, I would point out that the question which the Court there posed concerning determination of the date when employees "normally would have been discharged" was not here answered although specifically put to counsel. *Tennessee-Carolina Transportation, Inc.*, 108 NLRB 1369, cited by both the Union and the Company, is readily distinguishable.

In connection with the question of remedy, I would also refer to *U. S. v. Minute Maid Corp.* (Civil No. 6429-M, S. D. Fla.) where the consent judgment provided, *inter alia*, for maintenance of facilities, as follows:

> (C) Defendant Minute Maid shall take such steps as are necessary to maintain said frozen concentrate facilities at the standard of operational performance for the production of frozen concentrates in effect at the time of the entry of this Final Judgment. Pending such disposition of facilities defendant Minute Maid shall not permit said facilities to be diminished in capacity or to be turned to uses other than the production of frozen concentrates, where such use would in any manner, impair the capacity of such facilities for the production of frozen concentrates.

That wholly different situation may provide a point of reference for further consideration of adequate remedies in unfair labor practice cases. But what some will regard as precedent will be, by others, distinguished; consent in one case does not indicate authority to decree in another.

a situation, and the decision whether the Act should be amended.

A hearing was held before me at Florence and Darlington, South Carolina, from January 15 to 17 and February 19 to 27, 1957, all dates inclusive. Prior to the hearing and at the Union's request, subpoenas and subpoenas duces tecum were issued addressed to Deering, Milliken Service Corporation; Deering, Milliken & Co., Inc., and Roger Milliken individually and as an officer of Deering, Milliken & Co., Inc. Petitions were thereafter filed with the Regional Director to revoke said subpoenas, and were referred by the Regional Director for ruling by the Trial Examiner at the hearing. The petitions were considered by me together with the Union's answer thereto. In the arguments concerning the subpoenas, no distinction was made between the subpoenas ad testificandum and the subpoenas duces tecum. With respect to the former, Roger Milliken was present and testified at the hearing; whatever his capacity or position, his examination was limited, as noted, to the issues before us.

It appears that the Regional Director had earlier denied the Union's application to take the deposition of Roger Milliken and the two other companies. On the petitions to revoke subpoenas, the General Counsel took no position. The amended charge herein was brought against the Respondent Company and also against Roger Milliken, its president, and Deering, Milliken & Co., Inc.; but the complaint was issued against this respondent only. It is evident that from the inception of the proceeding there has been a difference between the General Counsel and the Union concerning the scope of the proceeding. This difference was further manifest as counsel for the Union sought to extend examination of witnesses despite the limitation of the complaint. It is the General Counsel's function to determine who shall be respondents, and his is the primary burden of presenting the evidence. His position is to be accepted rather than the

charging party's where there is a difference between the two. (The General Counsel further informed us that the Board has investigated and at the time of hearing was still investigating the relation between the Respondent and the other two companies.)

With that limitation and the further agreement at the hearing to avoid litigation of events at other mills, the attempts by the Union, without the support of the General Counsel, to extend the scope of the hearing and of examination of witnesses were barred. Thus, for example, he offered statements by Milliken in October 1955 and January 1956 as evidence of the latter's hostility to union labor. But these statements made reference to mills elsewhere, and the General Counsel noted that they should be taken in their entirety or not at all. Without exploring the situation at those other mills, we cannot determine whether the facts there justified critical remarks or whether these merely reflected hostility. There would thus be no basis for evaluating such statements. Further details concerning the respective positions and the rulings made, including the fact that Deering, Milliken Service Corporation was not properly served with subpoenas and the fact that the Union did not claim or show that it had material information but was merely exploring possibilities for their potential relevance, were set forth on the record.

After lengthy and eloquent argument by counsel for the Union and for the respective subpoenaed persons, I granted the petitions to revoke, with a statement of the grounds for the rulings, which referred to the various points raised by counsel. While the exclusion by the General Counsel of the issue of privity between the respondent company and other companies has not prevented findings of violation, it has perhaps limited the remedy since we have no evidence that other mills are in privity with the Respondent.

Pursuant to leave granted to all parties, briefs have been filed by the General Counsel, the Company, and the Union, the time to do so having been extended.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact (with reasons therefor)

I. The Company's business and the labor organization involved

It was admitted and I find that the Company, a South Carolina corporation with principal office and place of business in Darlington, South Carolina, manufactures and sells cotton greige goods; and that during the calendar year it manufactured and sold finished products valued at more than $6,500,000, more than 90 percent of which was sold and shipped to customers outside the State, and purchased raw materials, supplies, and equipment valued at more than $3,380,000, more than 92 percent of which was shipped in interstate commerce to the Darlington plant from points outside the State. I find that the Company is engaged in commerce within the meaning of the Act.

It was admitted and I find that the Union is a labor organization within the meaning of the Act.

II. The unfair labor practices

A. Outline of events

The Union initiated its organizing campaign at the Company's plant in or about March 1956. Some 16 meetings were held between May 6 and September 2, all in a public park outside the town of Darlington. On May 22, the Union sent to the Company a letter claiming that a majority of the employees had joined the Union, and requesting recognition and a collective bargaining conference.

On the following day the Union filed a representation petition with the Board. After a hearing on June 19, the Board, on August 24, issued its Decision and Direction of Election. The unit, admitted herein to be appropriate for the purposes of collective bargaining, was therein fixed as follows:

> All production and maintenance employees at the Darlington plant, including firemen, slasher foremen, and supply room clerks, but excluding office clerical employees, professional employees, watchmen, guards, and all supervisors as defined in the Act.

The election was held on September 6: of 523 eligible voters, 256 voted for the Union, 248 against. On September 11 the Company objected to the election, but the Board's Acting Regional Director, on October 8, recommended that the objections be dismissed. (The Company did not produce any witnesses in support of its objections to the election since at the time of the investigation there was a recommendation from its Board of Directors that the plant be liquidated. We need not decide whether, as the General Counsel claims in the face of a stipulation as above noted, the filing of the objections was a dilatory tactic by the Company. The refusal to bargain is found, *infra*, to have occurred on September 12, when the Board of Directors met, the day after the Company filed its objections.) On October 24 the Board issued its Supplemental Decision and Certification of Representatives, in which the Union was certified as the collective bargaining representative of the employees in the unit.

Between September 7 and 10 Milliken, the Company's president, arranged for a meeting of its Board of Directors for September 12, at which time he submitted and the Board adopted a recommendation to the stockholders that the plant be liquidated. Thereafter the Company accepted no new orders, there being sufficient orders on the books to keep

the plant in full operation for a time. On October 17 the stockholders voted to shut down operations and liquidate the plant. The plant was thereupon advertised for sale at public auction. Beginning on October 18, as the material on hand was utilized and the work ran out, employees were discharged and departments closed, and all operations were terminated on November 24. At the auction sale on December 12 and 13 the plant was offered for sale as a whole but then sold piecemeal for a greater sum. There is no claim that the sale was not to *bona fide* purchasers for value.

B. The alleged violation of Section 8 (a) (3)

Without consideration of interests and associations, events, or statements elsewhere, the General Counsel proved his case that the plant was closed and the employees discharged because of union membership and other lawful concerted activities. Counsel for the Union, as did a witness on the stand, charged Milliken with lack of regard for employees' welfare and undue concern with return on investment. This is not the forum to weigh, much less to judge, an investor's attitude. But as more emphasis is thus placed on financial consideration, there tends to be a detraction from the significance of any discriminatory intent. Despite these charges, the finding here will not be based on either counsel's argument or the witness' characterization.

Since the Korean War the industry generally and the Company in particular had faced constant difficulties. It is unnecessary to recount here the detailed evidence, testimonial and documentary, which I have carefully parsed, or to recapitulate the expert analyses submitted by counsel. Conditions varied from year to year, sometimes better than in 1956, sometimes worse; as much may be said of the outlook or prospects at various times. The facts in this connection do not themselves indicate that the Company was compelled to or did, because of either economic factors or

outlook for the future (aside from election indications), decide in 1956 to discontinue its operations. This finding, based on the mass of evidence submitted, is bolstered by the Company's own decisions and plans for the future, made prior to the date of the election, as we shall soon see.

Most impressive was the ingenuity displayed by the Company through the years as it turned to new methods and new products to meet competition. The evidence in this connection is an eloquent tribute to the competitive free enterprise system. Coming to 1956, there is no evidence that ingenuity suddenly vanished. On the contrary, the great abilities which had enabled the Company to overcome past obstacles reasonably warranted the expectation of continued success into the immediate future at least. Having said this, we must add that the Company had every right in 1956 and earlier to cease operations for economic or any other nondiscriminatory reasons—even if someone had decided that he was "just too tired" to exercise his ingenuity. Not only would I not suggest that operations were highly profitable; but even if they had been, there would be no concern over a nondiscriminatory suspension or cessation of business. Reference has been made to these economic conditions because they have been cited in defense to the charge of violation. In stating this defense, we must note that the Company does not rest on these conditions *per se* but rather points to them as background or as a cumulative cause when taken with its interpretation of the election results, which is considered *infra*.

Whatever the economic circumstances, up to the date when the Board of Directors recommended liquidation, physical improvements were made at the plant and new equipment was being purchased and installed with the evident intent to continue the plant in operation. Previously authorized, the improvement program was still in progress up to the election although the Board of Directors who thereafter decided to liquidate could earlier have discontinued that

program. Whatever the economic circumstances, until the election, orders were taken and accepted, clearly with the intent to continue the plant in operation, and warp yarn had been accumulated for the new looms which were to be installed. One need not gainsay these economic circumstances. But, although the balance sheets and the related statements of income and surplus show that there was and for a long time had been economic basis for liquidating and that the Company could have relied thereon, the record shows that they did not themselves compel or prompt the liquidation.[6] If other mills were compelled, by economic factors, to close, it is true as its counsel argues that the Company here did not have to stand like a soldier until struck down. It might have sought cover—and discontinued operations. But the new factor here was not failures elsewhere and the Company's inability to keep pace; it was the "Boo!" of the election. The deciding or triggering element in the steps taken to liquidate was the outcome of the election. Because of the emphasis placed on these economic factors as the evidence was presented and because of their importance in the conduct of the business, it should be made clear again that the issue before us is not so much whether the officers, directors, and stockholders of the Company were correct in their beliefs concerning economic conditions and outlook as whether it was those beliefs or discriminatory motives which prompted the shutdown and liquidation.[7]

We need not, as we might, rely on the very time sequence, the Company's Board of Directors recommend-

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[6]If termination is due partly to union activities and partly to acts or conditions which would warrant lawful discharge, the Act is violated. *N. L. R. B.* v *Jamestown Sterling Corporation*, 211 F. 2d 725, 726 (C. A. 2).

[7]Under the principle of *Rubin Bros. Footwear, Inc.*, 99 NLRB 610, we would consider, if necessary, whether the Company had a valid basis for such appraisal as would have warranted a shutdown for economic reasons.

ing, immediately after the Union won the election, that the plant be closed and the Company liquidated, as proof that the Company's decision and action were based on organization of the employees. Milliken specifically declared the effect of the designation of the Union as collective bargaining representative even while he claimed that it was and must be considered with the other conditions existing. Apparently recognizing that "The abruptness of a discharge and its timing are persuasive evidence as to motivation,"[8] the Company ably advances the contention that its action on September 7 and 12 and thereafter was based on conditions *dehors* the election, and that the election merely emphasized those conditions; the defense being that the decision to shut down was based on economic factors, and the election merely aggravated the situation. The Company, we are told in this connection, considered to be most important "the attitude of the worker toward his job." But whatever the phraseology, and I am quite willing to accept any other which will correctly represent the facts and the evidence, it is clear that the immediate and the moving factor was the election result.

On the morning of September 7, the day after the election, Milliken was in formed of the election tally. He requested his attorney, Poag, to come to Spartanburg, North Carolina, and later that day they there discussed the matter. In response to Milliken's question, Poag explained that the Union had won the election because the union organizers had built up the employees' resistance to the Company's "program of work assignment changes in line with the installation of new machinery"; Poag further declared his opinion that much resistance meant that the employees "would not cooperate with the installation of work assignments with the new machinery," and that the union literature

[8] *N. L. R. B.* v. *Montgomery Ward & Co., Inc.*, F. 2d , March 18, 1957 (C. A. 2), citing *E. Anthony & Sons* v. *N. L. R. B.*, 163 F. 2d 22, 26-27 (C. A. D. C.).

had created an obstacle in the minds of the employees by opposition to what it termed the stretch-out and by its emphasis on increased wages. (We shall further consider, *infra*, the historical "hard core" of resistance.) In response to Milliken's question, Poag agreed that the Union's election victory foretold additional resistance with the result that the Company would not be able to make its production competitive.

Milliken reviewed in his mind the various economic factors, and then over the telephone discussed all of the considerations with three of the Company's directors in New York, as well as with the successor, later elected, to one of them. It was tentatively agreed to call a meeting of the Board of Directors for September 12, and with agreement obtained on September 10 from the three directors in Darlington, the meeting was called and held. (It appears from the testimony of Oeland, treasurer of the Company, that the local directors were not told before September 12 what the purpose of the meeting was.) As these events are appraised, we should note Milliken's testimony that the election did not cause the liquidation; but it constituted a factor in calling the meeting of the Board of Directors, and further that it caused a review by the directors of all of the factors. This was a special meeting; not one called in the usual course or in advance of the closing of the Company's fiscal year.

But as we have seen, and even if we accept the Company's interpretation of and conclusions from the financial data which it submitted, the various factors and conditions cited, including keen competition and allegedly low earnings but excluding the election and its interpretation, had faced the Company for a long time—certainly through a period during which it made permanent improvements and planned more. (Concerning the financial data submitted, where comparison is made with respect to earnings at various plants,

consideration must be given to the fact that basic conditions were not alike at those plants. Thus, the mills differed in size and presumably in setup and extent of mechanization, and certainly in the types and quality of their products.) Whether in 1956, 1954, 1952; or any other time, the Company could have pointed to obstacles apparently insurmountable, and to difficult conditions in the industry as a whole. We could not, nor need we, have shown how the various earlier problems were to be solved. We need point out only that the Company itself in 1956 and up to the election had indicated its willingness to meet all of the obstacles and solve all of the problems which it has cited (except the problem which, in its opinion, was indicated by the election results themselves). I do not minimize these. Nor need I find that the Company could have successfully overcome all difficulties which it faced in 1956. It may be that, absent the election, a decision would lawfully have been made to shut down in 1956 or shortly thereafter. (This last issue, left open, has a bearing on the remedy.) No more than by the Union's propaganda to employees, *infra*, are we to rely on or be affected by the auctioneer's puffing of the mill as modern and up-to-date or the Company's news release issued with the sale in mind. For present purposes I find only that the Company's decision to shut down was an about face motivated by its employees' concerted activities as reflected in the election results. The extent of this about face is reflected in the fact that 523 employees were on the payroll just before the plant closed as compared with 550 at peak production. (These figures appear to include only employees in the unit. Very slightly different figures were also mentioned.) The plant operated on 3 shifts, 6 days per week, for a total of 144 hours per week generally and until September 12.

The limitation on improvements, which the construction, shape, and age of the building imposed, had previously been considered by the Company. These conditions had not

prevented the extensive improvements made to the date of the Board of Directors meeting. If the directors had several times previously discussed the matter of additional improvements and "felt that the future was too uncertain, and the facts concerning the building, itself, were too adverse to justify making such an expensive factor (or investment) whenever it was brought up," these conditions were not the moving consideration on September 12. As much can be said of the other factors cited such as the trend toward wider cloth, other mill closings, falling prices, and the number of new styles being produced; all had been considered, the improvement program extended, and plans made and carried out to continue operations. (Even had new conditions or factors developed, the triggering element was, as we have and shall again see, the election results.)

A textile engineering survey had been made for the Company in the summer of 1955. Some improvements were thereupon made with the evident intention to continue operations despite construction handicaps. As for disappointment in the lack of progress following installation of improvements, this had been noted and discussed through the years.

The election was again underscored for its evidence of uncooperative attitude when, although the rate of earnings at the mill was cited as one of the factors which dictated the closing here, Milliken explained that he proceeded elsewhere with a modernization program despite a lower rate of return—because the workers there were more cooperative. The cooperation shown at Darlington, or the lack of it, had not prior to the election cast the situation in a light worse than existed at the other plant. Certainly a modernization program had also been followed at Darlington.

While included in the many factors cited by the Company but which have been found not to have triggered the

shutdown and discharges, three so-called "new" factors should perhaps be further considered if only because of the greater emphasis placed on them at the hearing and for the possibility that, arising later than the other factors, they rather than the election results may have prompted the shutdown. (In any event we would have to remember Milliken's testimony concerning the effect of the election and the further fact that although these new factors had faced the Company prior to the election, it had nevertheless planned to continue production.)

One of the new factors which the Company faced was, as Milliken testified, a projected loss of 6 cents per pound on the products which it manufactured in 1956 if they were carried into 1957 with the same costs and the same prices. (We need not consider whether the capital improvements made in 1956, which indicate the intention to continue in business, were included in projecting a loss of 1957.) From the fact that the Company had in prior years found it necessary to change its construction or products, one can reasonably infer that losses were at those earlier times also anticipated if the then current constructions were continued. This condition in 1956 was therefore not a new factor. The Company might have continued as in earlier years and might have developed new and profitable constructions on 1957 as it had before. The history of production and sales as detailed in the record indicates that a regular and unchanging element was the factor of change. Further in connection with this projected loss, the drop in market price had been steady through the first 6 months of 1956 and therefore hardly a new factor in September. A loss projected for the future would be based on the assumption that the price would remain the same, whereas prices fluctuate; it would also assume that, while prices continued lower, costs would remain the same. Actually, the $480,000 annual loss or difference to the Company

suggested by Milliken on the basis of the drop in prices between January and June was not realized. A loss of $40,000, projected for 1956 by Oeland at the September meeting, had been considered in August by Milliken but had not apparently been discussed with the other directors. On the other hand, Oeland had not anticipated a shutdown, but was planning further improvements.

A second factor which the Company faced in 1956 was a wage increase granted at other mills and the loss which would result were it granted at Darlington. Some may view such an increase as an additional burden; others as an indication of a better outlook. But however, this might be construed, there was no requirement that an increase be granted. Any concern which the Company may have had in this respect could have been made known to the Union in an least preminimary exploration during the course of collective bargaining. Whether or not the Company had maintained a competitive wage level in the past, there was no sufficient basis on which the directors, in Milliken's words, "could fairly conclude that they were either going to have to raise wages or face an expensive strike." Campaign propaganda to the contrary notwithstanding, the Company, had it been willing to recognize and negotiate with the Union, could have *attempted* to obtain information and even a possible commitment on this item. The increase not granted during such discussion, that element of loss would be nonexistent. (It appears from later testimony by Milliken, that the Company had been paying wages higher than the average for the industry in South Carolina. This would suggest less need for an increase or need for less of an increase to maintain a competitive wage level.[9]

[9] Although here and elsewhere specific factors or issues are considered, we must not lose sight of the determining point: the results of the election prompted the action taken.

The third new factor cited was the increase in textile imports from Japan. Figures submitted appeared to include textiles of a type different from those manufactured at Darlington. But whatever those figures do show, it appears that the great threat and actual increase in imports had occurred at the end of 1955 and the beginning of 1956. Despite any problems caused by and the results of Japanese imports, and whatever the expressions of optimism or pessimism, in government circles and in the textile industry, the Company had continued to operate and, into the beginning of September, had no intention of discontinuing. There was limited reference to other mills in this connection, no objection being made thereto presumably because, and correctly if so, whatever the overall situation at those other mills, the parties in interest at those mills, including Milliken, who has interests in many, believed that the threat of Japanese competition in 1957 did not preclude the wage increase there granted. It does not appear that production and earnings outlook at these other plants differed from those at Darlington, or that the import problem here was more serious. (Milliken testified that he was not encouraged by the statement by a government official in September 1956 that the government was seeking to work out a solution to the problem of Japanese imports; rather, he saw seeds of future trouble. But he testified that, although he did not rely on it, he credited that statement and announced a wage increase in other mills, effective October 8. This may indicate that his immediate concern over economic prospects had been generally lessened.

While it was an old condition, another adverse factor was cited by the Company as having been aggravated. It thus may be considered as at least partially "new": the resistance by employees to work assignments and general refusal to cooperate with management. We recall the testimony that the Union's election victory was interpreted by

the Company as indicating the growth of this resistance to the point where profitable operation would no longer be possible (as Milliken informed the stockholders on October 17). Milliken testified that whatever hope the Company had had to meet competition "had diminished as a result of the election" because of the Union's campaign promises and statements and because a majority of the employees had voted in favor of the Union. Oeland had through the years referred to a small group or hard core of the employees who had resisted assignment changes; even the signing of a protest petition in 1952 by 95 percent of the employees had not disturbed Milliken to the point of making an inquiry. But formal organization of the employees, reflected in the election results, now brought action.

It is one thing for management to cite a condition which prevents operation; it is quite another to equate the result of a Board-conducted collective bargaining representative election with establishment or evidence of such a condition. The latter conclusion, if permitted to stand as a defense, would create built-in interference with the statutory right to select a collective bargaining representative. We are told in the Company's brief that "(the union's victory was not susceptible to any other interpretation" than that it "meant further efforts to cut the mill's costs would be impeded or halted." To allow an employer to cite an election tally as the cause or proximate cause or even triggering factor for a decision to suspend operations would be to undercut the statutory election machinery. In the instant case we have no evidence of employee resistance after September 6 greater than existed before the Company took steps to liquidate its assets. The Company could not lawfully point to the election results *per se* as evidence of such resistance or anticipated resistance. It dose not help the Company to say that the election results did not arouse its resentment but caused an impartial review of all of the

factors; and therefore to liken the situation to a tornado or fire as an act of God. Other considerations aside in comparing this with an act of God, the Act forbids such action as was here taken because of the election results; it does not forbid such action in cases of tornado or fire.

As for campaign propaganda and promises of greater pay and improved working conditions, expressed at union meetings, in letters to employees, or elsewhere, the Company may no more rely on these as dictating conidtions which it would have to establish than it is required by law to grant them in response to union requests. Such statements are not to be equated with violence as an unprotected activity; employees' membership in a union and their concerted activities are specifically protected, even encouraged, by the Act. To treat the Union's propaganda as reflecting an inflexible position assumed not only by the Union but also by the employees is to impose a penalty on lawful election tactics. (Some of the Union's letters were the basis for objections to the election, which were overruled.) Just as there is many a slip in the bargaining process between demand and agreement, so may that process not be circumvented by assumption that an agreement must mirror the demands. Whether demands are excessive or unreasonable may be considered at the bargaining table; the granting of demands, in whole or in part, is certainly the subject of such consideration: it is no foregone conclusion, as both unions and employers well know. An employer, by anticipating, not only union demands but even the need to grant such demands, may not close its plant to prevent negotiation. No more is an employer to assume that such charges as that management is rotten to the core, included in a union's propaganda, has permanently poisoned employees' minds so that they will no longer properly perform their functions. The Company did not act when the statements were made, but only after the election, when it construed the tally as proof of such poisoning and consequent recal-

citrance. This is another example of building interference into the election process.

The factors cited were sufficient to support a decision to terminate operations; certainly it cannot be said that such a decision could not reasonably, or even unreasonably but credibly, be based on those factors. It might not have been necessary under the circumstances for Milliken to apply the rowels to his fellow directors and stockholders. Thus we do not ignore the existence and the contributory effect of the various reasons or factors. It may be that, had economic conditions been different, the plant would have been continued in operation despite the election results; we need not speculate on that. But the facts and the evidence concerning them lead to the finding and conclusion that the decision to close the mill was not in fact based on economic factors, and that, but for the Union's election victory, that decision would not then have been made. It is undenied that, when Milliken was told immediately after the stockholders' vote on October 17 that 83 percent of the employees had petitioned to return to work, he replied that he would not run the mill so long as there were 17 percent of the hard core crowd. (He had taken no action when Oeland reported to him over the years that there was a resisting minority, perhaps 20 percent.) This might be found to indicate that, regardless of the other factors cited, the existence of a hard core of union adherents itself prompted the decision to liquidate or barred a reversal of that decision. But it is unnecessary to make such a finding. We have seen that termination due to a mixture of reasons, some lawful and others not, violates the Act.[10] Further, as Milliken testified, the election constituted a factor in calling the meeting of the Board of Directors, and caused a review of all of the factors. It does not appear that the "problem . . . would have compelled attention," certainly not the attention and action

[10]Footnote 6, *supra*.

which it received, but for the Union's election victory. As a matter of law it must be held that, with new and expensive equipment acquired and installed as late as September 1956, such a decision which would not have been made but for the protected organizational activities interferes with such activities; and the consequent discharges are discriminatory within the meaning of the Act.[11]

In addition, if the result of the election prompted a review of all of the factors which bore on the question of continued operation, that review and the decision to close the plant, so connected with the election and even if not discriminatory (as with respect to employees not in the unit), would constitute interference within the meaning of the Act since it would tend to discourage freedom of choice at elections. The remedy for such interference can be similar to that where discrimination is found.[12]

To show a predisposing tendency or animus on the part of the Company, counsel for the Union elicited testimony concerning company reference to the alleged ideology or sympathies of union leaders. Counsel for the Company offered to prove such ideology, but even if proved it would not be a defense.

Various supervisors' statements concerning closing of the plant, which are found *infra*, reflect the discriminatory motive here found. Although, as we shall see, those statements warrant the findings of interference by the respective supervisors, they are not shown to have reflected any declaration by Milliken. Those statements are therefore not relied on in the instant finding of company motive.

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[11]The Company is quite correct in its statement that the criterion is the situation as it existed in 1956, and not as it exists today. The footnote nevertheless appended to its brief, while indicating that prices have recently slumped to an 8-year low, discloses further that there was a "buying flurry" last autumn, when a high was reached—a condition which at that time would presumably have pointed to continued operation.

[12]*Rome Specialty Co., Inc.*, 84 NLRB 55.

Because of the Company's position on the effects flowing from its right to go out of business, it may be helpful to consider the cases which are cited in its brief and the arguments there made to the extent that they are not elsewhere covered herein, and even with some repetition. On the finding that it was no longer in business, the *New Madrid* case[13] limited the employer's liability; it did not grant absolution. The distinction, it must once again be said, is between finding of violation and declaration of remedy.

The Company thereafter argues that "motivation loses all significance when the employer permanently quits business." But the cases cited in support of that proposition exculpate the employer in each case because it acted from economic considerations. Not only does motivation not lose all significance, but the analysis of each case, as submitted in the Company's brief, specifically stresses motivation.

Since several times herein I indicate recognition of its practical significance, I do not question the statement: "Searching out motives in such a case is futile; the employer has ended his existence as an employer." But again, futility or absence of remedy does not determine the issue of violation. (Actually, we are not entirely without remedy here, even if it be not very effective.)

Other cases cited, in which it was found that the employer "had been considering" moving or closing, or that it was otherwise not motivated by antiunion considerations, differ in those respects from the instant case. Finally, unlike the *Martel Mills* case,[14] the decision here can be based, as has been indicated several times *supra*, on the Company's own explanation of the cause or causes of its action.

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[13] *N. L. R. B.* v. *New Madrid Manufacturing Company*, 215 F. 2d 908 (C. A. 8).

[14] *Martel Mills Corporation* v. *N. L. R. B.*, 114 F. 2d 624 (C. A. 4).

C. The alleged violation of Section 8 (a) (5)

The Board has held[15] that, by layoffs in violation of Section 8 (a) (1) and (3) of the Act, a company "created an atmosphere in which the 'free opportunity for negotiation' (*N. L. R. B.* v. *Jones & Laughlin Stel Corp.*, 301 U. S. 1, 45) contemplated by the Act did not exist," and thus failed to bargain in good faith, in violation of Section 8 (a) (5) although negotiations were being maintained. *A fortiori* is there a failure to bargain in good faith in the instant case, where the acts in violation of Section 8 (a) (3) were so complete as to discourage and ultimately thwart the Union from pursuing its right to bargain. As it is discriminatory against its employees, so does it constitute a refusal to bargain for an employer, on the basis of a union's campaign propaganda, oral and in writing, concerning improved working conditions and greater pay, to anticipate demands and compulsion to grant such demands, and therefore to terminate its operations and avoid bargaining.

The instant case can be contrasted with the recent *Leeds Shoe Store, Inc.*, a case,[16] where the Board held proper an employer's unilateral reduction of the workweek to conform with that of other employers and "in accordance with (a) predetermined timetable." Whereas the employer there properly questioned the union's majority, the Company here admittedly made its decision after the Union had requested (as we shall see) and *prima facie* proved its right to recognition.

At issue here are also the date since when the Union is to be found to have represented the employees, whether there was a refusal to bargain, and, if so, when. The complaint alleges that on or about September 6, 1956, and there-

[15] *American Brake Shoe Company (Ramapo Ajax Division)*, 116 NLRB 820, 833.

[16] 117 NLRB No. 90.

after, the Union requested the Company to bargain, and sets that date as the date when the Company refused to bargain. The answer, on the other hand, declares that not until October 31 did the Union request the Company to meet with it; that they did meet on November 7, when the Union offered no proposals, and that there have been no further requests to meet. While the complaint alleges that the Union has been the employees' representative since September 6, the date of the election, the answer cites the date when the Board issued its certification, October 24.

Absent other violations from which it infers earlier refusal to bargain, the Board declares a union to have been the collective bargaining representative since the date of its certification. Where interference prevents an election, the request for recognition is noted; in such cases an informal showing of majority may be relied upon and the employer, presumed to have sought in bad faith to have awaited Board certification, is found to have refused to bargain on the date of the request for recognition.

The General Counsel here argues that the refusal to bargain "culminated" when the decision was made to liquidate the plant; he has urged the date of September 7, when Milliken learned of the election result, and certainly no later date than September 12, when the Board of Directors recommended liquidation. The recommendation of its board effectively constituted the decision of the Company, and it was so declared when the stockholders met on October 17. The directors themselves represented a majority of the stock, and the Company's estimate of the effectiveness of their decision may be gauged by the fact that, although objections to the election were filed on September 11, the Company did not produce any witneses in support of its objections in view, as was stated at the hearing, of the recommendation to liquidate. We have seen also that, in

anticipation of the stockholders' adoption of the directors' recommendation of September 12, no new orders were thereafter accepted. Similarly, structural changes which had been begun were immediately halted, and it was decided to use the warp yarn which had been accumulated for the new machines which had been anticipated. On the day of the Board of Directors' meeting, a union representative asked the Company's attorney to arrange a bargaining conference, but was told to wait until after certification by the Board. The violation was pointed and led to the closing of the plant and which was set in motion that day indicates that the Act. The Company's attitude was formally and finally declared on October 17; it had existed and had been indicated on September 12. As in the cases where an election is prevented, we may, in fixing the date when the Union represented the employees, go back to the date when the Union proved (formally in this case) its majority. Clearly it represented a majority on September 6 even if certification was delayed.

I find therefore that since September 6, 1956, the Union has been the collective bargaining representative of all of the employees in the unit; and that since September 12 the Company, in violation of the Act, has refused to bargain with the Union.

As to any bearing on refusal to bargain which might be seen in violations noted *infra* and which occurred prior to September 12, we must first consider the question of waiver of those which occurred prior to the Direction of Election, on August 24.[17] Also, those violations, while attributable to the Company, do not prove bad faith on the part of those who were responsible for indicating the Company's willingness or refusal to bargain. (Only Milliken and Oeland had that status.)

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[17] *Aiello Dairy Farms*, 110 NLRB 1365, 1366-1369; *Alexander Manufacturing Company*, 110 NLRB 1457, 1460.

The Company and the Union did thereafter meet on November 7, at which time the Company submitted information concerning vacations, holidays, the incentive plan, and other fringe benefits. Information concerning wages was refused, the Company declaring that there was no point in furnishing this since an irrevocable decision to liquidate had already been made. Depending on circumstances, a decision to shut down and imminent closing might justify a refusal to submit information and negotiate. As the union representative said at that time concerning any proposal, bargaining would be "pretty empty" in view of the Company's irrevocable decision to liquidate.

But we have seen that the decision to liquidate was in violation of the Act. Being violative, it could not justify a refusal to bargain or, as part of that process, to submit information needed to bargain. As for irrevocability of the decision to close, the same stockholders who had voted to close the plant could reverse their decision. Certainly the Union was entitled to the information, both in order to bargain for a contract and, as representative of the employees, to attempt to persuade the Company not to close the plant. We need not hold that the Company was obliged to submit information for use by the Union in discussions with prospective purchasers of the plant: the refusal to bargain would be found in the Company's refusal to submit the information for use by the Union, whether effective or not, in discussions with the Company itself. It may well be that the Union's last request for information, in a letter dated November 26, when it was quite clear that the plant was going to be sold, was made with an eye to negotiating with prospective purchasers. But whatever the situation at that time, the Company had earlier refused to bargain, as has been found.

D. The alleged independent violation of Section 8 (a) (1)

Although they have not abandoned the allegations of independent violation neither the General Counsel nor the Union has covered this facet in their briefs; the General Counsel did allude to it in his closing argument. The Company's argument and brief have been no more detailed or comprehensive in this connection. Quite in agreement with all counsel, I recognize that, relatively, this is a minor aspect of the case. Out of deference to the mass of evidence received, I shall give it somewhat more attention than have counsel in their concentration on the more important issues.

1. SURVEILLANCE

The Union's meetings were held on Sunday afternoon in an open pavilion in a public park about 2 miles from town. The pavilion is not walled, and anyone walking or driving along the highway nearby could see people under the pavilion roof. Payton, the Union's southern director, testified that the public was invited to the meetings, written invitations were sent out, and some may have been sent to company supervisors. He explained, "We had no secrets." Two supervisors each attended one or more of these meetings, having received invitations in the mail addressed to them. If the letters addressed recipients as "Dear TWUA Member," I would not charge these supervisors, having observed them, for overlooking such limitation. In any event, with respect to the presence of these or other supervisors, the Union's attitude may well have been known to the employees, and the location of the meetings made it clear to them that the Union "had no secrets." We therefore cannot assess against the Company any tendency to interfere with organizational activities if such tendency did adhere to the presence of the supervisors. In this light, a request that an employee

keep a company representative posted on union activities or tell him who attended meetings would not tend to interfere with employees' union activities any more than would surveillance by a supervisor himself.

2. Telling Employees the Plant Would be Closed Because the Union Had Organized It

H. A. Campbell, a spare hand, testified that on October 5 in the office, he broached the subject of the Union and asked Oeland, the general manager, how the situation looked, and that Oeland replied that it looked very dim and that "if the union was out the mill would run and definitely in the mill would close." Oeland more credibly placed the incident on September 21, explained Campbell's presence in the office, and testified that Campbell, exhibiting what he said was a copy of an affidavit requested "by certain people up town to be used in an effort to throw out the election," asked whether such an affidavit "would help the situation any"; and that he replied that he "took a dim view of it being helpful." I find no intereference here.

Immediately after the Board of Directors meeting on September 12, the various supervisors were told to inform their employees of the recommendation to close so that the first news of it would not be via the newspaper on September 13. Goodwin, the Company's production supervisor, thereupon told employee Cook that the Company had made a mistake when they hired him and that he (Goodwin) hoped that Cook would be satisfied when he had all of the unemployed on his conscience. Goodwin explained that he was disturbed and spoke in anger because he too would lose his job. Similarly, early in the morning of September 13 Goodwin asked employee Andrews whether the union badge had done him any good, and told him that he had better start hunting another job. Notice of the recommendation to close might properly be given to the

employees before word of it appeared in the newspaper. But to connect the closing, as Goodwin did, with union activities tends to interfere with such activities, in violation of the Act.

The other supervisors also transmitted the news to their employees. It is unnecessary here to try to determine to what extent, if any, in each case the closing was connected with the election either in the telling or as the employee's own inference although in some cases the violation is clear even if the supervisor was informing the employee, as when Passmore voiced an I-told-you-so to employee Harrelson.

3. Threats

It is also alleged and I find that on or about September 11 Goodwin told employee Johnson that in any recommendation he would have to say that she was a good hand but that, by her own admission, she had voted for the Union. The necessity for the latter information in any recommendation is not apparent; the threat of blacklist in Goodwin's remarks is, and the Act was thereby violated. Employee Harrelson testified also to a threat of blacklist by Passmore, her second hand. Blacklist threats before the election are not alleged although there is testimony concerning such.

It was testified by various employees without contradiction that overseers and second hands, all of them supervisors, had said that the mill would close if a union came into the plant. Such statements are threats in violation of the Act. It is unnecessary to resolve the issue whether any supervisors attributed such a threat to Milliken since, even if they did, we would have no more than a similar offense chargeable to the Company without sufficient proof to charge it against top management generally or Milliken personally. The statements attributed by supervisors to Milliken could be found violative only for their restrain-

ing effect on employees; they could not be considered proof that Milliken had in fact so threatened. Nor need we pursue the issue whether some of these supervisors threatened to discharge employees for union membership or activities. "It is not meet that every nice offense should bear his comment."[18]

Shortly before the election (whether before or after the Direction of Election on August 24 does not appear) the Company posted on bulletin boards throughout the plant a series of 4 posters, 2 of which were received in evidence. One, under the caption, "Which Will You Choose?" depicts a plant in operation and one closed. Underneath the pictures is printed:

> The records prove that TWUA-CIO has caused many textile mills to close, ending jobs and bringing hunger and privation to people who want to work. Where that happens, only the money-hungry union dues collectors benefit—everybody else loses.
>
> DON'T LET THREATS OF VIOLENCE OR FANCY PROMISES DESTROY *YOUR* JOB — VOTE NO!

The other poster is entitled "TWUA-CIO 'BENEFITS' FOR WORKERS," and contains what appear to be copies of almost 20 newspaper reports of violence in connection with various strikes, union strike defeats, and employees' loss of jobs. The words, "Do You Want This?" appear at some half dozen places on the poster. The clippings shown refer to the Union and incidents elsewhere.

These posters do not appear to be a threat of loss which would result from any actions taken by the Company. They

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[18] Julius Caesar, Act IV, Scene 3, Line 7. Cf. *Plumbers, AFL (Frank W. Hake)*, 112 NLRB 1097, 1102: ". . . the extensive violation findings of the Trial Examiner, which we have adopted, and the warrant they provide for the broad remedial order we shall issue herein, render unnecessary and decision with respect to the foregoing incidents, which the Trial Examiner either passed upon or failed to pass upon . . ."

appear, rather to be expressions of "opinion, based on experience, that the employees would lose . . . benefits because (the Union) would not faithfully represent their interests."[19] (The reasonable effect or tendency of these posters is not to be judged in the light of subsequent events.) I would not find that the overall impression of the posters, weighing any suggestion in the pictures against the reading matter, constitutes a threat, or that they tend to interfere with concerted activities, in violation of the Act.

4. Support of a Disavowal Petition

Employee King testified that when another employee brought her a petition which was being circulated for disavowal of the Union, her second hand, Kinsey, came up and told her that two other employees were "100% for it." Kinsey offered no explanation, and it seems that he appeared on the scene to encourage her to sign the petition. This was unlawful interference. Kinsey also asked employees M. B. Gainey and G. E. Truett to get employees to sign the petition to help keep the mill open.

King testified also that she had asked her overseer, Shirley, "what kind of a paper was it that was going around." She later testified that she "thought he would give (her) advice on what (she) wanted to know." She did not ask whether she should sign the paper. Shirley told her that he did not know what kind of a paper it was, but he wanted her to sign it. That she had not asked for "advice" on signing is clear from her determined reply that she would not sign it. Thereafter, Shirley one day said to her, "Well, I see you didn't sign the petition like I asked you and you are going to suffer." Shirley testified in this connection only that King asked whether, if he were she, he would sign the petition; and that he replied that he did not see where it would help her, and "I have never seen it and

[19] *Nash-Finch Company*, 117 NLRB No. 116.

I don't know what it is but I don't think it would hurt you any if you did." I find that Shirley did ask King to sign the petition. While it does not appear to have instigated the petition, the Company in these and a few other instances (not all have been alleged) unlawfully encouraged employees to disavow the Union as their collective bargaining representative after it had won the election.

5. Interrogation

A few weeks before the election, H. W. Campbell, an overseer, asked employee Whitley how she felt about the Union. Employee Grant testified that in May Campbell asked her whether she had attended a union meeting the day before and had signed a union card. Campbell testified that he wanted to see how Grant stood, and that he asked whether she was for or against the Union. Overseer Shirley admitted questioning various employees concerning the Union and their stand.

There is no need to list all of the instances of questioning of employees by supervisors concerning the Union and their activities and attitude toward it. Interrogation of employees was not isolated, even if we exclude questions concerning union meetings for the reasons noted *supra*, and in context of the violations found, it constitutes interference within the meaning of the Act.

III. The effect of the unfair labor practices upon commerce

The activities of the Company set forth in Section II, above, occurring in connection with the operations described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. The remedy

Having found that the Company has engaged in and is engaging in certain unfair labor practices affecting commerce, I shall recommend that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

Cease and desist recommendations and conditional recommendation for affirmative action will be made although I would not undertake to refute the argument that in the existing circumstances they are futile. If this adds up to no effective remedy, no acceptable alternative has been indicated or appears to be warranted. Some may irreverently say that we have been flagging a dead horse. Others, quoting the bard, that we have an "airy nothing." Except for the publication of a notice, recommendations for affirmative action will be made dependent on resumption of operations.

It has been found that the Company refused to bargain collectively with the Union thereby interfering with, restraining, and coercing its employees. I shall therefore recommend that the Company cease and desist therefrom and also, upon request in the event that the Company resumes operations, bargain collectively with the Union with respect to wages, hours, and other terms and conditions of employment, and embody in a signed contract any understanding reached.

It has been further found that the Company, by ascription of the closing of the plant to union activities, threats, support of a disavowal petition, and interrogation, interfered with, restrained and coerced its employees in violation of Section 8 (a) (1) of the Act. I shall therefore further recommend that the Company cease and desist therefrom.

It has been further found that the Company, by closing the plant and discharging its employees, discriminated against them in respect to their hire and tenure of employment in violation of Section 8 (a) (3) of the Act. (As to

those not in the unit, Section 8 (a) (1) was violated.) The record shows that, on or about October 15, as his work fell off (with the extra warp yarn on hand, some operations ran at less than capacity between September 12 and October 17), employee Andrews quit his job to seek fulltime employment. While we cannot say how much more work he would have had but for the discrimination, the decision to accept no more orders and to shut down the mill led to the drop in work and thus to his quitting. Employee Kelly, who quit on October 15 to take another job, appears also to have been constructively discharged. That question with respect to any of the employees can be determined on compliance should it develop further. There is no evidence of wholly voluntary quittings or of discharges for cause after September 12. I shall therefore recommend that, in the event that the Company resumes operations, it offer immediate reinstatement to their former or substantially equivalent positions,[20] to all employees who were on the payroll on September 12, without prejudice to their seniority and other rights and privileges. Positions when available shall be distributed among employees on a preferential basis according to such system of seniority or on such other nondiscriminatory basis as heretofore has been applied in the conduct of the Company's business. Because of the unusual circumstances, I shall further recommend that the Board reserve the right to modify the reinstatement provision of its Order.

It might appear to be almost sadistic, not against the Company but against the Union and the General Counsel, to direct that the Company post notices by advertisements in local newspapers. But the Union has so requested and, if such advertisements will lessen the effect, on employees and potential employees, of the interference, discrimination, and refusal to bargain, they may serve a worthwhile pur-

[20] *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827.

pose and effectuate the policies of the Act. In this small community, the employees can be expected to acquire full knowledge of the advertisements. With the plant closed, there is no reason, except punitive, to direct mailing of notices to the employees.

The unfair labor practices found herein indicate a purpose to limit the lawful concerted activities of the Company's employees. Such purpose is related to other unfair labor practices, and I find that the danger of their commission is reasonably to be apprehended. I shall therefore recommend a broad cease and desist order, prohibiting infringement in any manner upon the rights guaranteed in Section 7 of the Act.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Textile Workers Union of America, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

2. All of the Company's production and maintenance employees at its Darlington plant, including firemen, slasher foremen and supply room clerks, but excluding office clerical employees, professional employees, watchmen, guards, and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. Textile Workers Union of America, AFL-CIO, was on September 6, 1956, and at all times since has been the exclusive representative within the meaning of Section 9 (a) of the Act, of all employees in the aforesaid unit for the purposes of collective bargaining.

4. By refusing to bargain collectively with Textile Workers Union of America, AFL-CIO, as the exclusive

bargaining representative of the employees in the appropriate unit, Darlington Manufacturing Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

5. By discriminating in regard to the hire and tenure of employment of its employees, thereby discouraging membership in a labor organization, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

6. By such refusal to bargain and discrimination and by ascribing the closing of the plant to union activities, threatening a blacklist and closing of the plant if the Union came in, supporting a disavowal petition, and interrogating employees concerning union membership and activities, thereby interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, the Company has engaged and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

7. The aforesaid labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that the Respondent Company, Darlington Manufacturing Company, Darlington, South Carolina, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Textile Workers Union of America, AFL-CIO, as the exclu-

sive representative of all employees in the appropriate unit with respect to rates of pay, wages, hours of employment, or other conditions of employment;

(b) Discouraging membership in Textile Workers Union of America, AFL-CIO, or in any other labor organization of its employees by closing its plant and discharging its employees or discriminating in any other manner in respect to their hire and tenure of employment, or any term or condition of employment;

(c) Ascribing the closing of its plant to union activities, threatening a blacklist and closing of the plant if the Union came in, supporting a disavowal petition, and interrogating employees concerning union membership and activities; and

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Textile Workers Union of America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a)(1) of the Act.

2. Take the following affirmative action, which I find will effectuate the policies of the Act:

(a) Upon request in the event that the Company resumes operations, bargain collectively with Textile Workers Union of America, AFL-CIO, as the exclusive representative ofthe employees in the appropriate

unit, and embody in a signed agreement any understanding reached;

(b) In the event that the Company resumes operations, offer to all employees who were on its payroll on September 12, 1956, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, in the manner set forth in the section entitled "The remedy," above;

(c) Advertise once a week for 8 weeks in the News and Press, Darlington, South Carolina, and the Florence Morning News, Florence, South Carolina, a copy of the notice attached hereto and marked Appendix; and

(d) Notify the Regional Director for the Eleventh Region, in writing, within twenty (20) days from the receipt of this Intermediate Report and Recommended Order, what steps have been taken to comply herewith.

It is further recommended that the Board reserve to itself the right to modify the reinstatement provision of its Order.

It is further recommended that unless the Company shall within twenty (20) days from the receipt of this Intermediate Report and Recommended Order notify said Regional Director, in writing, that it will comply with the foregoing recommendations, the Board issue an order requiring said Company to take the action aforesaid.

Dated at Washington, D. C., this 30th day of April 1957.

LLOYD BUCHANAN
Lloyd Buchanan
Trial Examiner

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby notify our employees that:

WE WILL bargain upon request, in the event that we resume operations, with TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, as the exclusive representatives of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment, or other conditions of employment, and embody in a signed agreement any understanding reached. The bargaining unit is:

> All production and maintenance employees at our Darlington plant, including firemen, slasher foremen and supply room clerks, but excluding office clerical employees, professional employees, watchmen, guards, and all supervisors as defined in the Act.

WE WILL NOT discourage membership in TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, or any other organization of our employees by closing our plant and discharging our employees or discriminating in any other manner in respect to their hire or tenure of employment, or any term or condition of employment.

WE WILL NOT ascribe the closing of the plant to union activities, threaten to blacklist employees or to close the plant if the Union comes in, support petitions disavowing TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, or interrogate employees concerning union membership or activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

WE WILL, in the event that we resume operations, offer to all employees who were on our payroll on September 12, 1956, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

All of our employees are free to become, remain, or to refrain from becoming or remaining members in good standing in TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8(a) (3) of the Act.

DARLINGTON MANUFACTURING COMPANY
(Employer)

Dated ....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

UNITED STATES OF AMERICA

BEFORE THE
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

ROGER MILLIKEN and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO	Case No. 11-CA-1071

Mr. John M. Dyer, for the General Counsel.

Messrs. Townley, Updike, Carter & Rodgers, of New York, N. Y., by *Mr. Stuart N. Updike* and *Mr. Lee W. Meyer*, for the Respondent.

Mr. Nate Janes and *Miss Patricia Eames*, of New York, N. Y., for the Union.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

BUCHANAN, Trial Examiner: Issuance of an Intermediate Report at this time itself calls for an explanation concerning procedure in these proceedings, which have been beset by procedural complications. How this question arises we shall now see as we briefly review the history of the various proceedings to date, all under the same charge and amended charge; the basis for answering this question will be shown *infra*.

On September 6, 1956, the Union won a Board-conducted election at Darlington Manufacturing Company. On October 17, the stockholders voted to dissolve the corporation; operations were at once discontinued except that the

stock in process was run out, and the employees were successively dismissed as their work ran out; all operations were terminated on November 24, and on December 12 and 13, 1956, mill and equipment were sold at public auction.

The Union had filed, on October 16, a charge which alleged violation by Darlington of Section 8 (a) (1) of the National Labor Relations Act, as amended, 61 Stat. 136. An amended charge, which alleged violation of Section 8 (a) (1), (3), and (5), was filed on November 1 against "Darlington Manufacturing Company, Roger Milliken, President and Deering-Milliken & Company, Inc." On December 4 a complaint was issued against Darlington alone. The issues raised by that complaint were heard in January and February 1957, and an Intermediate Report issued on April 30.

After oral argument on exceptions to the Intermediate Report, the Board on December 16, 1957, called for a hearing on the single employer status of Darlington and Deering, Milliken and other corporations. That hearing, report on which had to be held in abeyance with the issuance of the instant complaint (the third in the series) and a motion to consolidate, was based on the remand order and on a complaint (the second in these proceedings) against "Darlington Manufacturing Company," "Roger Milliken," and "Deering-Milliken and Company, Inc."; as noted *infra*, the second complaint has been dismissed as to Roger Milliken.

The Board having denied the motion to consolidate the second and third complaints, there came on for argument before me at New York, New York, on April 9, 1959, a motion to dismiss the latter. Briefs had previously been filed, and counsel were heard in detailed argument which, as we shall see, was not limited, as on a motion to dismiss, to the third complaint: this Intermediate Report is based also on the statements concerning the proposed proof to be offered at the hearing, on an affidavit submitted by the Union

with its brief, and on an agreement among counsel at the argument to the extent that the answer admits the allegation of the instant complaint concerning ownership of Darlington stock. All of the latter are factual items which supplement the complaint.

More inclusively, the determination or findings herein are made on the basis of the entire record in these proceedings to date, including the charges filed in 1956, the testimony concerning Roger Milliken's acts as previously found, the statement of what would be shown at a further hearing, the duties and authority of Darlington's officers, and the affidavit received to explain the Union's intent when the amended charge was filed. It becomes unnecessary, in view of the various and sufficient bases for the determination herein, to consider such controverted items as the extent of Rogers Milliken's control, as distinguished from ownership of Darlington stock. It appears that, conversely, were the General Counsel's position here sufficient as a matter of law, the facts previously found and those here noted would warrant an Intermediate Report and the conclusion that Roger Milliken is liable individually even without decision on such issues as the extent of his control of Darlington stock. In short, the General Counsel, who as we shall see is relying on the evidence previously adduced as support for the instant complaint, would here prevail were that evidence sufficient for findings against Roger Milliken individually; he cannot where it is not. The arguments of counsel, as pointed out at the time and as counsel, and this Intermediate Report search the record of this entire case to date, the earlier proceedings being part thereof and relied on herein; and further testimony is unnecessary.

Having indicated the scope of the instant proceeding and the extent of the matters relied on for the decision and recommendation in this Report, we come to analysis of the bases for a decision. We have already noted that the

amended charge of November 1, 1956, upon which the instant complaint against Roger Milliken is based, refers to "Darlington Manufacturing Company, Roger Milliken, President and Deering-Milliken & Company, Inc." As early as the begining of the first hearing, in stating my reasons for granting a motion to revoke subpoenas, I stated that "the amended charge in these proceedings was filed not only against Darlington Manufacturing Company and Roger Milliken as President," but also against Deering, Milliken. That interpretation, i. e., that the reference to Roger Milliken, President meant Roger Milliken *as* President, appeared to me to be natural, legal, and correct; it still so appears.

On those subpoenas, reference by the Union was to Roger Milliken individually, as President of Darlington, and as President and Treasurer of Deering, Milliken; similarly on the contemporaneous application to take depositions and for the issuance of subpoenas. The Union's recognition of the significance of the phrase "Roger Milliken, President" was further indicated by the reference to "Roger Milliken, President of the Respondent" in its brief to the Trial Examiner after the first hearing, filed within 6 months of the October 1956 events.

To the present argument that the word "President" in the amended charge does not indicate that the charge is against him in his capacity as president but merely "serves to identify who Roger Milliken is," the short answer is that "A. B., President" is construed as a reference to or identification of A. B. in his capacity as officer, not to A. B. individually. With full understanding that Davis, the Union's International Representative who filed the charges, is not a lawyer, the fact remains that they were not filed against Roger Milliken. Davis' affidavit of intent cannot overcome the legal effect of the language which he used and the limitation thereby created; this aside from the argument by counsel for the Respondent against that affidavit's relia-

bility, which at this point I do not question. If the charge and the 6-month statutory limitation are intended to put respondents on notice, the charges here did not give such notice to Roger Milliken individually. Whatever the intent and however innocent the error, the burden is not to be transferred to one who is innocent of that error. Further, ample opportunity existed to amend the charge again: 3 months or less after the original and amended charges were filed, and well within the statutory period, I referred, as noted *supra*, to the amended charge as having been filed against "Roger Milliken as President." If that interpretation was not the General Counsel's and the Union's, and if it did not reflect the Union's intent, there was neither protest from them nor amendment of the charge.

The Respondent points out that in *Republican Publishing Company*,[1] cited by the Union, the Board dismissed the complaint against "Bowles as Trustee" because the charge named "Bowles." The Union answers that the dismissal there was based on the failure of the complaint to name Bowles as Trustee, while the instant complaint does name Milliken individually. To this the reply is that, if omission of a name or proper designation from a complaint warrants dismissal, then omission from the charge is as important for its failure to serve the purpose of giving notice. This is not a case of a technically erroneous listing which, in the absence of other reasonable construction, can be held to have given notice to a person other than the one designated. It is understandable and not at all uncommon, from charge through final decision, to cite a corporation and a named officer *qua* officer. A frequently taken and recognized step is not to be construed as something else merely because it is unnecessary. With respect to the findings made and remedy directed against Bowles, who "actually conducted" the business, the *Republican Publishing* case is included in the footnote reference *infra* to cases involving or related to the prin-

[1] 73 NLRB 1085.

ciple of piercing the corporate veil. (Nor does the instant case involve the question of a charge, sufficient to support a complaint, reinstated after it had been dismissed because of a clerical error.)

From the filing of the charges, through the protests and objections, to limitation of the original complaint to Darlington, and thereafter, the attempt has consistently been made to show an interrelationship to the point of liability among the various corporations; Milliken has been referred to in his capacity as officer of Darlington and other corporations, not individually; and the intent thus disclosed and the factual finding here of such intent are in harmony with the ruling that as a matter of law Roger Milliken individually was not named in the charges. The distinction and difference noted are carried out in the instant complaint, which is not brought against "Roger Milliken, President." If it be argued that the latter would defeat the purpose of this proceeding, that would be but recognition of the variance between the amended charge and the complaint.

This ground for dismissal was included as one of the reasons for my dismissal as against Roger Milliken of the second complaint in October 1958. While it became unnecessary to pass on it at that time since the Board in its ruling of October 22, 1958, relied upon and cited as "the sole ground" the first reason which I had stated, the very question has here been presented. Similarly, while decision on this ground makes it unnecessary to consider other bases for dismissal, statement of such other bases may serve to avoid future reference, argument, or hearing.

We shall soon turn to consideration of the evidence of violations heretofore adduced and indicated for further hearing. We can here note that such evidence, characteristic of proof of corporate violation but not of individual liability, indicates that the charge, found to have been filed against Milliken as President, was properly so filed: it may be small consolation, but the evidence warrants the charge as

filed against him in his corporate capacity, not as an individual.

Before leaving this point, it should be noted that there is no suggestion that Milliken sought refuge behind a corporate entity and organized, maintained, or dissolved Darlington to avoid an obligation to comply, as successor or otherwise, with the Act or a Board order, to enable him to violate the Act without penalty, or to evade the Board's jurisdiction. Mere organization of a corporation for the purpose of limiting financial liability, saving on taxes, or other common corporate purpose does not make the owner of some or even most of the corporation's stock, with the extent of control of stock here suggested, personally liable for the corporation's violations. The Board has pierced the corporate veil in cases of sale or dissolution and organization of a successor, where a scheme to evade has been shown. But there is no warrant for piercing the corporate veil here to impose liability on Milliken individually under the allegations of the complaint as amended. Unlawful intent in organizing the corporation has not been shown; and the findings of violation heretofore made were, as noted *infra*, based on acts chargeable to Darlington and Milliken, not individually but as its officer. His activity in connection with the violations found, detailed by the Union, do not call for a proceeding or remedy against him individually under the Act and decisions thereunder or under the principles of corporate law. The cases cited by the Union are distinguishable by the tests noted above. None of them involved a complete cessation of business and permanent liquidation, as here.

In the *Cookeville Shirt Company* case,[2] cited by the Union and the Respondent, the complaint named French, an officer of the respondent company as a respondent in his individual capacity, and the remedial order was directed against him because of "the prominent role" played by him

[2] 79 NLRB 667, 671.

in the violations.[3] But the Board there specifically refused to issue a blanket order against French in connection with other plants of which he was an officer, and the order against him did not cover any 8(a)(3) remedy, there being none in that case. Aside from the point, noted *infra*, that the corporation is not a party here, we shall soon see that there would be no practical difference here so far as remedy is concerned were an order to run against Milliken in connection with the Darlington violations. We are not at the moment considering cases involving individuals who, as respondents, are individually liable for reinstatement and back pay because they sought to evade obligations, and who can be reached by piercing the corporate veil. Nor, in the light of the ruling concerning remedy in the Intermediate Report in the Darlington proceeding, is there basis for further remedy here. At most (this is a concession which may only lead to further argument), considering *Cookeville Shirt*, and if greater personal involvement by Milliken than has been shown were found, we could here direct a remedy against him limited to Darlington's operations with respect to the 8(a)(1) and (5) violations, and excluding the 8(a)(3) aspect with respect to reinstatement and back pay, as in *Jackson Daily News*,[4] and *Sanco Piece Dye Works, Inc.*[5] but as an additional remedy this would be quite meaningless and could not justify the taking of testimony for the third time in this proceeding. It is unnecessary to explain and further distinguish each of the other cases cited by counsel; all have been examined and considered.

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[3] Conceding that Darlington acted through its president, directors, and stockholders in violating Section 8(a)(3) and (5), I cannot see how it could have committed those violations with less involvement of Roger Milliken. As for the 8(a)(1) violations, we shall note that they were not chargeable to Milliken individually and that they are not even now alleged against him.

[4] 90 NLRB 565.

[5] 38 NLRB 690. Cf. also *Consumers Lumber and Veneer Company*, 63 NLRB 17. In *H. McLachlan & Company, Incorporated*, 45 NLRB 1113, the remedy ran against an individual who, as stipulated, was "a person acting in the interest of" the corporate employers. Similarly in *National Lumber Mills, Inc.*, 37 NLRB 700, the remedy

As before, the request to bargain is here alleged to have been directed to Darlington, not to Milliken personally. No more than he was asked to bargain did the latter in his individual capacity refuse. Nor is there evidence of any other personal violation by him. For example, it is not claimed that he prompted the 8(a)(1) violations found. Darlington is liable for its supervisors' acts under the doctrine of *respondeat superior*. That doctrine does not impose liability on Milliken any more than it does on Darlington's chief active or operating executive, who under the bylaws as previously shown is its treasurer, Oeland.

True, the original hearing was held on the issues of violations by Darlington. But we know from the General Counsel that, beyond the acts or statements brought out in that hearing, evidence might conceivably be offered of "only one or two things" not already in the record; there would be very few additional matters, like Roger Milliken's speeches. Those speeches were cited at the first hearing to show Darlington's violations, and their rejection was not based on the fact that Milliken was not a party. They were rejected because they were collateral to the issues and would have opened the door to a mass of collateral testimony as pointed out at that hearing and in the Intermediate Report thereafter issued. The testimony concerning those speeches would not have proved further violation of Section 8(a)(1) beyond those alleged and found; nor would they prove that the violations alleged in the complaint now before us were chargeable to Roger Milliken individually. Neither would a few acts or statements like Milliken's speeches have constituted violations of Section 8(a)(3) and (5) or add to the violation of those subsections already found. Further, such additional acts or statements are not even included among the detailed allegations of violation of Section 8(a)(1)

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was imposed against an individual who controlled a closed corporation. The 8(a)(3) remedy has been included in other cases, which embraced the element of piercing the corporate veil.

which are set forth in the instant complaint against Roger Milliken. If it be urged that the acts and statements would indicate such an attitude or animus by Milliken as would support findings of violation of Section 8(a)(3) and (5), the answer is that his attitude has already and clearly been noted in connection with the finding of company motive in terminating operations.

Counsel for the Union did declare his inability at the time of the argument herein to state what would be shown. But we must bear in mind that this complaint was issued more than 3 months ago and that an early hearing has been anticipated; and, more significant, that 2½ years have elapsed since the filing of the charge which allegedly cited Milliken individually and presumably was and is based on activities by or chargeable to him. Under these circumstances there can be no justification for an additional hearing when, after the General Counsel has indicated that the proof would in general consist of that at the first hearing (it would be shown that Milliken committed the unfair labor practices by and with Darlington and Deering, Milliken), the Union states only that proof will be submitted at the hearing to support any allegations which the General Counsel has not substantiated.

We do have clarification in the General Counsel's arguments that Milliken and the other directors are not "compartmentalized": they act as individuals as well as in their capacity as corporate representatives. But this argument, resting on the reference to evidence already received, does not call for further hearing; the evidence can be considered as received here, and its sufficiency determined as a matter of law. Such procedure follows the line called for by the Union itself for stipulations to avoid repetition of testimony.

The General Counsel and the Union have acknowledged that Milliken is not guilty of so-called independent violation of Section 8 (a) (1) (we have just noted that there is no such allegation); this in spite of a statement which he made

to a public official concerning a "hard core" of union supporters, which statement was again cited by the General Counsel at the instant argument. Thus counsel for the proponents even now correctly treat this statement by Milliken as one chargeable to Darlington (it was so regarded in the Intermediate Report), not to Milliken individually. In identical manner, the violations of Section 8 (a) (3) and (5) depend on Milliken's acts as representative of the corporation, not in an individual capacity. Since there is no indication that new or different evidence would now be offered, we can evaluate such evidence at this time as offered against Milliken individually, and rule on it as on a motion to dismiss at the close of the General Counsel's case. (We have thus gone beyond a motion for summary judgment, which the Union recognizes.)

The limitation to Milliken as officer, both in the proof received and in the proposed proof further warrants dismissal of this complaint. As officer of Darlington, he is and will be included in any remedial provisions directed against that corporation. As for other corporations, should they be brought within the ambit of liability, the remedy there proposed or directed will similarly include corporate officers. We thus already have complete coverage of Milliken as officer to the extent that the charge refers to him as such; and, as just shown, no personal liability on his part even were the charge construed as referring to him personally.

Nor does the presence of Milliken individually solve any problem of remedy. Certainly if Darlington is not to be directed to go back into business, Milliken cannot be directed to enter the business and personally employ the discriminatees. With respect to back pay, were any to be directed, the remedy runs against Darlington, its officers, agents, successors, and assigns. In the latter connection we can compare a recent decision in which the Board declared the business agent "was acting for the Union and within his au-

thority when he engaged in the various actions that the Trial Examiner found violated the Act . . . Accordingly we find that (the business agent), as agent for the Union, has similarly violated" the Act. The Board's order was there directed against the Respondent Union, "its representatives, officers, successors, assigns, and agents, including the Respondent Business Representative"; and the notice to be posted called for the signature of "(the named agent), Business Representative."[6] Surely another hearing is not warranted to obtain an order against Milliken as officer or agent of Darlington instead of against Darlington, its officers, agents, successors, and assigns. Neither am I aware of any request, to the Trial Examiner or to the Board in the Darlington portion of this proceeding, that the remedial order cite Milliken as an officer or agent.

On behalf of Roger Milliken it is here further argued that, when it was pointed out at the beginning of the lengthy hearing in 1958 that Roger Milliken was not properly before us as a respondent, the General Counsel could and should at that time have sought enlargement of the scope of the Board's remand order to include him if a complaint was not previously issued against him individually; and that the Board and the General Counsel "are estopped, or would be abusing their discretion in not considering themselves estopped, presently to prosecute or entertain this or any other proceeding against Roger Milliken which purports to be based upon the same amended charge. . . ."

The law is well settled that there is no estoppel here. While that principle was emphasized by the Respondent at the argument, there remains the plea of abuse of discretion, which I must leave for action by the Board in the first instance should it be deemed necessary to consider this point.

The further point is urged by the Respondent that, while the complaint alleges that both Darlington and Deering,

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[6] *Local 49, Sheet Metal Workers (New Mexico Sheet Metal Contractors Association, Inc.)*, 122 NLRB No. 145.

Milliken are engaged in commerce, Roger Milliken, the sole respondent herein, is not himself so engaged, nor is it alleged that he is; and that the Board lacks jurisdiction herein since there is no respondent who is alleged to be engaged in commerce within the meaning of the Act. (Here is perhaps a practical and immediate result of the procedural involvements and complications, of which the motion to consolidate and the order thereon are the most recent prior to the problems here raised.) In support of its position, the Respondent cites the Fifth Circuit's decision in the *National Paper Company* case.[1] Having gone so far in stating other grounds for dismissal of the complaint, I believe that we can safely say at this point that it is unnecessary to pass upon this last.

Contrary to the contention of the Respondent herein, I find that Roger Milliken was an agent, using the term in its generic sense, of Darlington in his capacity as officer and director. But this is no more than saying that Darlington was liable for his acts, as previously found, and that any remedial order against it runs against him in his corporate capacity.

The attempt, legal and proper, has been made in the motion, at the argument (which, as noted *supra*, was extended by all counsel beyond the scope of the motion), and in this Intermediate Report, to avoid protraction of this litigation. It is not for me to serve or indulge the predilections of counsel or to impose any personal notions of my own on the issues before us. Thus we are not to consider the arguments of counsel addressed to the welfare of individuals or groups, or to be swayed thereby in passing upon the issues. This is a legal proceeding, and we are to proceed to decision according to the law in statute and cases.

With respect to the question of remedy, which has proved disturbing and been made the subject of exceptions

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[1] *N. L. R. B.* v. *National Paper Company*, 216 F. 2d 859, at 868, revg. 102 NLRB 1569.

and pleas (which I respect) for justice and the general welfare, it is not our function in this proceeding to amend the Act. But it may prove of some comfort to those who stand aghast at the idea of a violation without an apparent remedy, to point out that the situation in this case is self-limiting and does not indicate that the Act can be violated with impunity. We have seen that Darlington went out of business; the evidence submitted does not show that it has been continued under a different name to permit violators to escape a remedial order while reaping the benefits of the business. Whatever the factors which the Darlington stockholders weighed, corporations will not generally go out of business and liquidate their holdings to avoid dealing with a union. Where such steps are taken, financial loss will normally result and there will certainly follow the loss of profits and of that hope for future profits which motivated the enterprise. (If one thinks of motivation other than hope for profit, satisfaction of that motivation, whaever it be, will be denied as the business is liquidated.) If this does not line the pockets of those discriminated against, no more are they compensated when an employer is unable to pay; and it is not our broad social function to provide compensation and a remedy beyond the provisions of the Act. The fact remains that the situation here will hardly become common.

On the basis of the findings of fact and upon the entire record in the case to date, I conclude that no charge has been filed against Roger Milliken, and that he has not individually, as distinguished from his capacity as officer and director of Darlington, engaged is unfair labor practices within the meaning of Section 8 (a)(1), (3), or (5) of the Act. It is unnecessary to repeat here the earlier conclusion of law that the Union is a labor organization within the meaning of Section 2 (5) of the Act, or, for the reasons set forth *supra,* to find or conclude whether Roger Milli-

ken, the sole respondent cited in this complaint, was engaged in interstate commerce within the meaning of Section 2 (5) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that this complaint be dismissed in its entirety.

Dated at Washington, D. C., this 30th day of April 1959.

LLOYD BUCHANAN
Lloyd Buchanan
Trial Examiner

Intermediate Report (1959)

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

DARLINGTON MANUFACTURING COMPANY ROGER MILLIKEN DEERING, MILLIKEN & Co., INC. and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO	Case No. 11-CA-1071

Mr. John M. Dyer, for the General Counsel.

Messrs. Townley, Updike, Carter & Rodgers, of New York, N. Y., by *Mr. Stuart N. Updike* and *Mr. John R. Schoemer, Jr.*, for Deering, Milliken & Co., Inc., and Roger Milliken.

Messrs. Price & Poag, of Greenville, S. C., by *Mr. D. Poag* and *Mr. John R. Schoemer, Jr.*, for Darlington Manufacturing Company.

Mr. Benjamin Wyle, of New York, N. Y., by *Mr. Nate James*, for the Union.

SUPPLEMENTAL INTERMEDIATE REPORT AND RECOMMENDED ORDER

BUCHANAN, Trial Examiner: This is a report after three rounds of what if, not for any championship, may yet

be regarded as a historic fight. As referee with the additional duty to explain my decision, mine is not to reason the why of all this. But one can wonder whether more progress toward a determination of the problems here would not have been made, once the complaint was issued in the form determined by the General Counsel in 1956, had the issues presented in the original hearing and covered in the first Intermediate Report herein, that of April 30, 1957, been passed upon as urged exactly 2 years ago.

These thoughts intrude on our present consideration since however strictly we apply ourselves to the items of fact, which are myriad, and the issues of law, which are novel and difficult, we realize that there has for a long time persisted a very real and practical situation which, if not clamoring for decision, has certainly warranted one: on the one hand more than 500 employees no longer employed and clearly not bargained for; on the other, pendent charges of violation of the law and hundreds of thousands of dollars tied up with the threat of liability running into millions as time elapses. The delay is under-scored by the provisions for priority handling in the new Section 10(m) of the Act, effective November 13, 1959.

Nor have these been 3-minute rounds. The extent of the problems first presented was hinted at in the remand order of December 1957. The third hearing, based on an additional complaint, represented an attempt to have ditto marks inserted under the findings and conclusions of the first so that they would apply to the individual respondent. The second hearing, on which we must now report, was an inquiry into the relations among various corporations as indicated by lengthy and detailed oral testimony and examination of almost 400 documents which themselves were, as we were informed, the distillate of many thousands earlier examined. Darlington and other companies have here been viewed paradigmatically in an exhaustive examination of its various activities and their nature.

Extreme effort needs neither apology nor defense. But such effort has been manifest here in the hours of preparation, hearing, and argument. The concept of public service and recognition of the rights of litigants give rise to the hope that the problems here involved will before long be resolved.[1]

We might at this time consider the words of Mr. Justice Holmes: "And it seems to me that at this time we need education in the obvious more than investigation of the obscure."[2] The hearing which this supplemental reports covers has been an education in the obvious: existence of many corporate entities is recognized and the facts concerning their relations largely agreed upon or admitted. But findings and conclusions to be developed from those facts are disputed and, with the claim that the corporate set-ups obscure a single entity status, we are indeed engaged in an investigation of the obscure.

I would normally state at this point that briefs have been filed by the respective parties, the time to do so having been extended. In this instance I want to say that counsel have favored me with well documented briefs, which I regard as I would many an author's autographed work. That the briefs do not cover all of the items cited at one time or another in the hearing as relevant to the issues is quite understandable despite counsel's thoroughness in their briefs as in preparation for and conduct of the hearing.

By a remand order on December 16, 1957,[3] after it had heard oral argument following issuance of the first Intermediate Report, the Board has called for determination

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[1] I realize that whether this Report be concluded with a period or an exclamation point, there will actually be a question mark as it awaits further consideration. Our procedure provides almost built-in, quasi-automatic question marks. In this case they have preceded and indeed prompted this supplemental hearing and report.

[2] Quoted by Max Lerner in "Mind and Faith of Mr. Justice Holmes," page 388.

[3] 119 NLRB 1069.

whether what some have called an integrated operation and others an empire constitutes a single employer so that a remedy for violation by one corporation can be applied against other corporations. Conceivably[4] it might be found under the order that the other corporations or some of them were directly or indirectly involved in and guilty of the violations found. If these statements be an oversimplification, they at least suggest the problem here, which will be more fully described. The Respondents have noted that the offer of proof to which the remand order referred alleged single employer status of the Respondents Darlington and Deering Milliken. While counsel is correct in saying that the offer is important, I must rely on the order itself, which clearly embraces various other mill corporations.

Circumstances do indeed order things as they alter cases. Our problem would be to determine whether the order of things here, the relationships and activities, reflect that measure of ownership and control which warrants a finding of single employer status or whether such order is merely circumstantial and indicative of or compatible with independent status of the various companies and Darlington in particular. With the mass of evidence before us and the detailed preparation by counsel, the allusions are specific; but the probative effect is obscure. Unlike other long cases under the National Labor Relations Act, the need here is not to weigh credibility in resolving many different if relatively uncomplicated questions as where issues of violence, employees' fitness, or employer's motives are involved; but to measure admitted activities on a scale which will ultimately indicate voluntary cooperation and independent status, or control and single employer status.

Yet, whatever the scope of the remand order, the hearing was largely confined to the proof of the relation be-

[4]Counsel indicated disagreement on this point, which need not now be decided.

tween Darlington on the one hand and Deering Milliken and the related Deering Milliken Service Corporation (now known as Palmetto Service Corporation) and Deering Milliken Research Corporation, hereinafter DMSC and DMRC respectively, on the other. At the General Counsel's request, the hearing was kept open for 3 weeks so that he might consider the advisability of "further investigation of the relations of the other companies; along with or parallel to what (he had) attempted to do here in regard to Darlington," and of a request to the Board for clarification of the scope of the remand order. (No request for extension of the hearing was made, and by prior arrangement, it was closed on November 13, 1958.)

Whether there ultimately proved to be a substantial or a tenuous connection between the offer of proof originally made and what was in fact presented at this hearing, one would expect that, the offer having been made, the proof would soon thereafter be forthcoming. Yet many months elapsed between the remand order which cited the offer and the hearing. It is not a sufficient reply that the months were spent in accumulating evidence.[5] For this would merely underscore the extent to which the hearing under the remand order exceeded the scope of what was originally available to be offered. The thread of continuity may have disappeared. But never has a mill worked on so long a yarn.

But the hearing was based on more than the remand order. For on February 3, 1958, the Regional Director for the Eleventh Region issued an amended complaint against the three Respondents named herein. Thereafter a hearing under the remand order and on the amended complaint was held before me from September 30 to Oc-

[5]The term "evidence" will be employed herein to refer to testimony received at the supplemental hearing. Although not material to the issues raised by the pleadings and tried at the original hearing, such testimony is relevant under the terms of the remand order.

tober 10, 1958, at Charleston, South Carolina, and from October 15 to 23, 1958, in Charlotte, North Carolina, all dates inclusive. Whether the hearing directed by the Board could properly be so extended by the Regional Director by issuance of an amended complaint with new allegations without leave from the Board[6] was not at that time tested: for reasons which need not now be considered,[7] no objection was raised to this procedure of bringing in additional respondents in the remand hearing; its acceptance was specifically declared by counsel. The amended complaint was thus received subject to Board approval; such approval, only to the extent that a corporate party was added, was implied when, as we shall now note, the complaint was on motion dismissed as to the individual respondent.

This motion to dismiss as to Roger Milliken was granted for several reasons which I stated on the record. Upon appeal, the Board affirmed my ruling "upon the sole ground (the first which I had stated) that the amendment to the complaint to the extent that it included Roger Milliken as an individual respondent went beyond the permissible (sic) scope of the Board's remand order of December 16, 1957." This left the two named corporations as sole respondents.

With the issuance of a new complaint against Roger Milliken (same case number) on December 31, 1958, and a motion to consolidate that complaint with the one herein, I suspended work on this Intermediate Report pending Board decision on that motion. The motion was denied[8] on March

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[6]The virtue of such procedure remains undiscovered. It could introduce many new problems and seriously delay action which the Board had itself postponed for a limited purpose.

[7]I pointed out early that, if single employer status were shown, the determination herein would include all who are embraced within such status. Counsel for the Respondent appeared to agree at one time.

[8]In its order the Board recited: "Upon exceptions to the Intermediate Report, the Board remanded this case in 1957 for further hearing." The suggestion of causal connection between the exceptions and the remand was surely unintentional: we shall note *infra* the terms of and the basis for the remand.

11, 1959, and I further deferred action herein until after I had issued reports in 10 other cases, 9 of them heard after the instant hearing. On April 30, 1959, (2 years to the day after issuance of the first Intermediate Report), I recommended dismissal of the complaint against Robert Milliken.

The violations and the proceedings to date can thus be summarized. But the answer to the question of single employer status depends on the facts adduced at the remand hearing, and these cannot be readily summarized. The General Counsel and the Union do not rely on a certain few elements alone to prove their contention: They urge the whole record, several thousand pages and hundreds of detailed exhibits almost each of which lends itself to lengthy argument, as a unit. Conversely the Respondents must be heard with respect to each item and the whole.

To attempt to select and analyze what appear to be salient elements must therefore evoke objections that not only have other elements, also salient, been omitted but that the entire picture relied upon has not been presented. Yet the alternative of reciting all of the facts developed at the hearing is not practicable for it would mean repeating most of the record and multiplying it many times for analysis of the pros and cons. That record remains available although we are perforce limited here to a precis of the testimony and exhibits. In fact, because of the repeated references and many cross references to various items, a detailed reference index would be necessary to insure coverage of all of the testimony and avoidance of repetition. (In fact, on completion of this report, I find not so strangely that I do have indices of the various subjects mentioned and of the exhibits, prepared to insure coverage of the salient points and to avoid duplication despite repeated references and cross references.)

While the briefs refer to various exhibits, the arguments, although sometimes detailed, are frequently general, and necessarily so having regard to the quantity of the evi-

dence and the nature of the findings sought. Most of the exhibits mentioned (many with little more than their citation and a phrase or sentence to describe them) and some which are not mentioned[9] are herein noted; it is unnecessary to point out the specific respect in which others do not prove what has been claimed for them. I do not delude myself into believing that the parties, the Board, or a court will accept my selection (and concomitant omission) of salient or representative points, not to mention my analysis of those points, although the same selection might have been received before unfavorable analysis.

Here is no nicely ordered bill of fare from appetizer to dessert or from soup to nuts. (Cocktails and liqueurs can be left for other tastes.) The smorgasbord spread before us is without such an orderly pattern. This is not to say that there is no plan or purpose: in lieu of nicely routined variety leading to a climax, we are surfeited by quantity. (The mass here compels redundancy). Even a generous helping can do no more than suggest what is on the serving platters. But who wants the entire buffet or a steam table? If it will not do justice to the General Counsel's case and the Union's position to cite only some of the items which they have noted, it is manifestly impractical to describe and analyze each one with the arguments pro and con. All have several times been considered, at the hearing (as was evident to counsel) and since. It is with full awarenss that there are many more, than I shall mention some typical or outstanding (in the sense that they are among the more persuasive which have been cited as proving or denying single employer status) items, and some others. The respective proponents may complain that a limited selection is *per se* improper; they will surely object that mine is at least unrepresentative. Aggrieved parties, whether on one

[9]Of the 81 exhibits received while Roger Milliken testified, 1 is not listed as such although referred to in the transcript, and 2 others are shown as having been marked for identification only.

side or the other, will likely take such exception (and more) at each stage of the proceeding although it will be necessary to recite the evidence not detailed here and to indicate its value in support of the exceptions thus taken. Even if not specifically cited in this Report, all of the testimony, written and oral, and the arguments of counsel have been carefully weighed even as it was clear that none was slighted at the hearing. Unwilling to leave to those who from mere reading of the record may not sufficiently familiarize themselves with the facts, I shall mention or specifically refer to approximately 175 exhibits, passing over only those which can most readily be seen to be without probative value, and including many not cited in the briefs.

Having said this, I must add that I do not mean to slight the painstaking efforts of counsel in preparation for, during, and, in briefs, since the hearing. In extenuation I can only and anticipatorily point to the determinations which will be made on review or appeal and which, whatever their conclusions, will undoubtedly cite relatively few facts in coming to a decision. Since I have been with this case in its various stages for such a long time, I may be permitted the observation that, having alone heard it and being the first to analyze the record and contentions to findings, conclusions, and recommendations, I should be more satisfied that the time spent in hearing and decision was warranted were accurate review and greater acceptance and recognition accorded to a Trial Examiner's rulings and conduct of a hearing and his report and recommendations.

On the other hand and in contrast to any charge of undue condensation, it might be urged, although this will be denied by anyone against whom a specific finding is made, that there is here an unnecessary detail of facts and analysis; that far less would suffice for all who have been concerned with these issues, and who have undoubtedly penetrated to the correct conclusions. But we must further make all

this clear to those who follow us (in point of time if not in agreement) in consideration of these matters; and heed must be paid to the injunction that reasons be here stated for the findings and conclusions made.

Since it was not within the issues presented at the original hearing and passed on in the first Intermediate Report, we can assume[10] that the remanded question of single employer status has been presented in connection with the question of remedy rather than for possible finding of violation by other, if related, corporations. Seventeen mill corporations (there is also reference to "eighteen mill corporations"), some of them wholly owned subsidiaries of others of them, and owning 27 mill plants, have been referred to and identified as related[11] corporations and Deering Milliken mills without prejudice to the issue before us. The relationship is alleged to be with Deering Milliken, DMSC, and DMRC. It is admitted that a majority of the stock in the various corporations is commonly owned. Appended hereto as Exhibit A are lists of officers and directors of Deering Milliken and Darlington as succinctly set forth in the Union's brief. Additional details concerning stock ownership and the officers and directors of the various corporations are in the record and need not be repeated here.

Another of what may be called basic financial facts is that Darlington and some of the other Deering Milliken mills operated on their own capital, i.e., unlike others of them it did not borrow from Deering Milliken or from a bank any capital needed to finance its operations. This affects the pattern of uniformity cited as existing in other respects among these mills. But it does not bear on the more basic

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[10] These preliminary and other speculative remarks arise out of a desire to provide what the Board will deem adequate basis for a decision.

[11] In using this term in its remand order, the Board followed the Union's offer of proof but quite evidently did not intend to foreclose the issue.

issue of control, which could exist or not regardless of uniformity in source of capital.

It was admitted and I find that Deering Milliken, a New York corporation with principal office and place of business in New York City, New York, acts as exclusive sales agent and extends credit to and factors the accounts of various textile mill corporations among which was Darlington; that during the calendar year 1956, as exclusive sales agent, it sold finished products valued at more than $100,000,000, which were shipped in interstate commerce to customers in various states throughout the United States; and that Deering Milliken is engaged in commerce within the meaning of the Act.

There is no claim that any of the various corporations other than Darlington, or any of their departments, was in any way itself directly[12] connected with the violations alleged. The allegations of extended liability in the amended complaint are the same as those brought in by the remand order, and depend on proof of single employer status; there are no new or additional violative acts, and it is only by some finding of taint in the other companies' relationship to Darlington rather than by acts on their part that additional findings of violation and liability can be made.

Neither has it been claimed that liability for the violations found should be widened because the mills, and specifically Darlington, have controlled Deering Milliken; rather, that the latter has controlled Darlington. But with exceptions such as those to be noted *infra*, this record discloses generally the natural business desires and activities which would characterize any independently controlled mill and selling agent or factor. (Since this a written, not an oral report, the reader's suspense has already been dispelled

[12]This is not a case of such control by a parent or other corporation that it may be said to have wronged or defrauded anyone insofar as remedy is concerned. Cf. *N. L. R. B.* v. *The Timken Silent Automatic Company*, 114 F. 2d 449, 450 (C. A. 2).

by a quick glance at the end.) That both mill and agent have common interests is not surprising: both want a sound, substantial, and reliable manufacturer, a saleable product, and sales. From such desire and purpose stem the various services, from joint purchasing facilities and engineering assistance to marketing service and sales, and including technical and administrative advice, which sales agents and factors commonly render and which were here rendered by Deering Milliken. Acceptance of facilities and advice is consonant with control; it is also consonant with independent status: it proves neither. (This is not to overlook the question of degree, infra.) But rejection of advice does negate control, and although we might expect general acceptance of advice and assistance from experts, there are instances of rejection, as we shall see. Nor does it appear that Deering Milliken's desire to sell adversely affected Darlington's or the other mills' operation to the former's benefit or for what might be an overall profit or benefit were the companies one.

Not only does integration of operations, which is compatible with independent ownership, management, and control, not prove single employer status between Darlington and Deering Milliken, but such status would not be meaningful in the present context. The problem of remedy here is not so much that of finding or following assets: enough remains in Darlington to cover most of the varied requests for backpay. Our greater concern is with continued production and continued employment; and Deering Milliken is no substitute for Darlington in that connection.

Detailed and lengthy as the evidence is, it centers (as has been noted, on Darlington's relationship with Deering Milliken, DMSC, and DMRC, with only occasional and sometimes oblique reference to the other mill corporations, as we shall see. Whether to extend findings of violation, or for purposes of remedy, or for whatsoever reason, the evi-

dence called for by the remand order and received might thus extend liability to these three DM corporations; but with respect to affirmative relief, only for backpay since these corporations do not themselves employ mill workers. The situation might be different were there proof connecting Darlington with the three "Deering Milliken" companies and, *through them*, with the other mills; for then reinstatement and bargaining possibilities would exist. The General Counsel and the Union clearly have not proved a single employer status of the mill corporations other than Darlington with the three DM corporations. It appeared to me at the hearing that the General Counsel recognized this (although he may argue that his review indicated the sufficiency of the proof in all respects) when he sought and received leave to keep the hearing open to consider an application for permission to offer proof concerning the question of "chain" connecting all of these latter corporations. As far as the other mill corporations are concerned, therefore, their liability must depend on the evidence of single employer status between them, or any of them, and Darlington directly, despite the present prayer that in the alternative Deering Milliken be directed to "reinstate these employees in other Deering, Milliken mills." (In addition to the extent of common officers, directors, and ownership of stock, referred to *supra*, we shall note evidence of dealings among the various mill corporations.)

If these statements concerning the limited basis for findings of relationship and liability are not clear to one who has not closely followed the ramifications and intercorporate dealings, it may be said, to simplify roughly, that the attempt was made mainly to lay Track A between Darlington and the three DM companies, with some light lines drawn between Darlington and other Mills; but there is no Track B between the latter and the DM companies which might, if Track A could carry the load from Darlington to Deering

Milliken, continue the run from Darlington via the Deering Milliken companies to the other mill corporations. Thus with very little (generally in connection with sale of some orders and inconclusive evidence concerning constructions manufactured, *infra*) submitted to connect Darlington with the other mills directly, and even less to connect DM companies with such other mills, there is no basis for imposing liability on the latter whatever may be shown with respect to the DM companies; unless the extent of cooperation among the mills as in their sponsorship of DMSC and DMRC can be held to create a joint liability.

The concept of single entity or single employer and any decision with respect thereto will vary with the field of law and the questions involved. Thus, while the framework of this case has been stretched beyond the issues raised by the pleadings and originally presented, it should not be presumptuous to note that we are ultimately limited by the nature of the inquiry and the scope of the Act.[13] To cite an instance, what we would recognize as separate and independent organizations might be characterized by such a degree of cooperation and joint effort as would violate the antitrust law. Toward the other extreme are cases involving jurisdiction,

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[13] "But administrative discretion is no broader or stronger in its field than is judicial discretion in its field, or legislative discretion in its field, or executive discretion in its field. Chief Justice Marshall said of judicial discretion, 'Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. . . .' " Prettyman, *Trial by Agency*, page 8.

In *New York* v. *United States*, 342 U. S. 882, Justice Douglas declared at page 884: Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty." Some may question or object to this concept of expertise. The question is from one who highly endorses it.

where the Board, interpreting its own limiting standards, accepts jurisdiction in a case and over several entities even if it regards them as separate for the purpose of remedy.[14] Similarly in cases involving employer associations or local branches of nationwide organizations, as we shall note *infra*, while jurisdiction is taken because of the overall extent of interstate activities or the nationwide aspect of the business, the violation and remedy are assessed only against the violating segment. Our own concern with single employer status differs from that in these cases. The Board will here presumably stress centralized control of labor relations while also considering interrelation of operations and common management and ownership.[15] (It was noted in the original report that there was no claim that the sale at auction was

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[14]See *Radio Station KBTM, AM-FM*, 32-RC-1097, unreported, decided October 10, 1958, where the Board combined for jurisdictional purposes a jointly owned but otherwise unrelated radio station and grain elevator. See also *Orkin Exterminating Company, Inc.*, 115 NLRB 622, 624, and at 627.

[15]The remand order quotes the offer of proof in connection with the latter's claim of centralized control of operations and labor relations. See also *Central Dairy Products Company*, 114 NLRB 1189; *Metco Plating Company*, 110 NLRB 615; *Crenshaw's, Inc.*, 115 NLRB 1374. The importance of the element of control was recognized in the Union's offer of proof at the original hearing herein; and it was on the basis of that offer that the Board, declaring that "it is desirable" to have additional evidence, remanded the proceeding for further hearing.

See also *Dearborn Oil and Gas Corporation*, 125 NLRB No. 71, where, in denying that a single employer status exists "for the purposes of the Act," the Board noted that one of the three legal entities under consideration there rendered services to the other two on a cost-plus basis; its foreman and 3 of its 20 employees "were involved in temporary or permanent transfers between" it and one of the other two; the employees of this latter one were directed by the supervisors of the first "to an extent not specified in the record"; and all three used the same bookkeeper and the same office. The dissent, arguing that a single employer status exists, noted that "all the Respondents were under the common control and direction of one individual . . . in their business operations as well as in their labor relations," etc. All agreed that common control is the most important factor, and the majority, referring to "the crucial area of labor relations," stressed "centralized control of labor relations."

not to bona fide purchasers for value. One aspect, raised at the instant hearing, will be considered *infra* in connection with sale of orders.)

Actually the remand order calls for findings which go beyond mere control of labor relations: we have been asked to explore the existence of a single employer status. A measure of control might exist where there is no such status. This brings us back to the point where, whether we label our finding as one of complete control or of single employer status, Darlington's functions have been discontinued; and the three "Deering Milliken" companies (here excluding the mills), even if they had previously controlled those functions, cannot be considered the employer and cannot be directed to employ or otherwise completely remedy the violations found.

While Section 2(2) of the Act includes as an employer "any person acting as an agent of an employer, directly or indirectly," it does not appear that the related corporations here acted as agent for Darlington in connection with its labor relations policies. Certainly the responsibility and liability of an agent does not extend beyond the scope of his duties or activities. Furthermore, as distinguished from single entity, the question of agency on the part of entities not named as respondents would not be the subject of a remand at this point; it would await decision and direction of a remedy, and then be passed on in the definition of "officers, agents, representatives, and assigns" if that usual phrase were here adopted. It is unnecessary to repeat here, as was pointed out in the Intermediate Report of April 30, 1959, that whatever restrictions might be imposed on agents they would not be directed to carry the burden of positive remedy, i. e., to bargain, reinstate, or make whole—unless the elements of intent to evade and subterfuge were present so as to make them liable for the violation.

If as has been suggested the evidence fails to show a single employer relationship between Darlington and the

other mills, and no remedy can be imposed against Deering Milliken, such facts alone would appear to dispose of any aspect of our inquiry which is relevant to the issues raised by the pleadings. But we continue with the testimony received under the remand order.

With the conclusion of this introductory portion, it is clear that this report is extended because of the quantity of material received, the number of claims and questions raised, and the extent, although severely limited, of the necessary written analysis of even a portion of that material. A general resolution of the issue presented by the remand order could quickly be made on the overall impression; a so-called "common sense" generality might be uttered which would not even begin to support one position or satisfy the other (a fatuous hope), and which would omit the reasons which point to the decision to be made. While the evidence does not and need not lead to Descartian certainty, I submit the conclusion in this case with less doubt than frequently exists, as in resolution of questions of credibility.

Findings of Fact (with reasons therefor)

Decision here does not depend on resolution of credibility: testimony and exhibits were received without contradiction with only occasional aspects which called for attempts to reconcile or explain. We are left with the need to draw inferences rather than to establish credibility; and with respect to inferences the Board, as it has frequently noted, need not rely on the Trial Examiner's findings and conclusions as it does on his credibility resolutions.

We have been informed that no stone or paper which related to Darlington and any of the corporations was left unturned in preparation for this hearing, and that everything has been submitted which might conceivably show the relationship claimed by the General Counsel and the

Union (and some which could not conceivably show it). The unnecessary is superfluous. But what, which can be analyzed, will be superfluous, and to whom? The feasible method here appears to be to consider all of the evidence cited by counsel and their arguments, and then, without detailing such evidence and arguments except those which appear to be most weighty, to summarize them and make findings. We now turn to the very real problem of being temperate and selective in our analysis to avoid an evidentiary crapulence while at the same time doing full justice to the proof.

The facts concerning ownership of stock in the various corporations are set forth in an exhibit in evidence and, uncontroverted, need not be detailed here. It is conceded that members of the Milliken family, directly or through ownership of stock in other corporations, own a majority of the voting shares of Deering Milliken and of various mill corporations, including Darlington. The question of piercing the corporate veil is considered *infra*.

Omitting for the moment any questions of ownership or control of other corporations, Deering Milliken is a sales and factoring corporation. Its services to the mills, in sales, tax-wise, etc., will be described *infra*.

DMSC shares are owned by the mill corporations affiliated with Deering Milliken, each such corporation owning one share for each of its mills. Thus Darlington, with one mill, owned one share in DMSC. The mills are not required to avail themselves of DMSC's services, various phases of which will be hereinafter described, nor are they prohibited from using such services from other sources. The service agreement between each mill and DMSC is terminable at will on notice, but, except on liquidation, none of the mills has ever terminated its agreement. There are no service agreements with any domestic mills other than Deering Milliken mills. It was testified that work by DMSC for the

mills was at their request, and that "lack of uniformity" among the mills was uniform, some recommendations being variously adopted and rejected by the mill treasurers. As in other respects, it does not appear from the mass of documents considered in this connection or from the greater number examined by the General Counsel, that control was exercised outside of the respective corporations or that decisions were imposed on them by Deering Milliken, the service or research corporations, or other mills. In connection with operating procedures and maintenance, a system of demerits and comparative mill records was developed by DMSC to assist the mills and to serve as incentives. There was no element of any penalty which was or could be imposed by DSMC. Prior to 1951, when DSMC was organized, the industrial engineering department at Judson Mills serviced the other mills.

DMRC was organized and maintained as a cooperative effort by the Deering Milliken mills and Deering Milliken for research and advice when called upon. The mills contributed to DMRC in proportion to their sales, and Deering Milliken according to its commission income. Reference was made at the hearing to memoranda which noted research on machinery types and improvements, and assistance in maintenance programs, as we shall note.

Various functions of these three corporations and points of contact among them and various mills will be noted infra. Neither the General Counsel nor the Union claims economic homogenization of the various corporations and mills and their business. The organization of these entities does not itself indicate single employer control over the mills. Rather it is urged that the contacts and relations shown indicate control and single employer status. The elements of control may be different in various situations: in large operations, in small, in one industry, in another. But control there must be if single employer status is to be found.

As distinguished from ownership,[16] execution of policies at the various mill is in the hands of the respective treasurers. Even in cases where a permanently binding and exclusive arrangement exists that fact does not *per se* indiciate single employer status. There can be various degrees of cooperative activity among several entities without such control as to constitute the entities a single employer.

The corporate by-laws and the evidence in that connection indicate that the chief executive officer of Darlington was Oeland, its treasurer, not Roger Milliken, its president, their authority typifying those positions in cotton mills generally, according to the evidence. As I have found in the proceeding against Roger Milliken individually, Oeland was Darlington's "chief active or operating executive" and this is apparently conceded. He alone was authorized to spend $25,000 for capital additions for the year ending November 1955; and the officers were jointly authorized to spend an additional $100,000 without approval of the directors. While president of Darlington, and except for his employment of Oeland, *infra*, Milliken had never hired, fired, or transferred any employee; this was done by Oeland as treasurer and administrative head.

Here the question naturally intrudes, Because of the extent of Milliken family ownership, were Roger Milliken's wishes in fact commands to the mills? But Minot Milliken and Roger Milliken testified that at various times suggestions or proposals by the latter to mill treasurers have not been carried out. They appear to have been no more controlling than were suggestions from sales personnel or others who sought to assist the mills, the decision remaining with the mill treasurer. Even a presumption that Roger Milliken's suggestions received greater consideration might be unwarranted since full consideration was evidently given

[16]The differences should be clear: stock ownership; control of policies other than labor relations; control of labor relations; single employer status.

to suggestions from all expert and responsible sources; as noted at the hearing, the achievement of optimum results is a general desideratum. Milliken could plan, urge, and exhort; he did not control. If, as the Union claims, directions which "were usually stated politely as 'suggestions' or 'advice' " were constant in their flow and exact in specificity, control was not proved thereby. More in point is the claim that "the record leaves no doubt but that the understanding by both commander and commanded was they were to be followed." But, as noted, the record is replete with testimony concerning suggestions which were not adopted.

Besides the points that actual control and authority lay with the mill, not with Deering Milliken, and that Roger Milliken, as we shall be reminded, was a mill officer, the question is raised whether in offering suggestions to the various mills he was acting on behalf of Deering Milliken and attempting to exercise control for the latter. Many documents in evidence and described in detail might be discussed here in this connection. All have been considered but the principles which govern them need not be repeated with respect to each. We have a memorandum dated November 14, 1956, from him to various mill treasurers and to various DMSC people, to which are attached a quotation from the October 1956 Newsletter[17] of the South Carolina Chamber

[17]This is to be distinguished from a Newsletter which Oeland sent weekly to Milliken. Shortly after his arrival at Darlington, Oeland said "that if it was all right with (Milliken), he would like to keep sort of a personal diary which he would like to put in the form of a weekly letter to (Milliken) so that he could put down what he was working towards, what his goals were, and what his accomplishments had been." Milliken apparently never commented on these Newsletters. He also received a monthly letter from Monarch; no newsletter from any of the other mills. The Newsletters indicate a desire by Oeland to gain Milliken's approbation beyond what would follow from successful operational results. This is further indicated by Oeland's requests for Milliken's opinion and approval. Originating with and voluntarily continued by Oeland, they do not indicate diminution of his authority or of the authority of the various mill treasurers.

of Commerce and an article and editorial from America's Textile Reporter of November 8, 1956. The Newsletter refers to turmoil and inefficiency at a stranger mill since a labor contract was signed several months before, and the announcement that the mill would be closed the following month.

Milliken's memorandum declares that the union leaders had misled the employees and that Darlington had been negligent in its public relations; it urges that the recipients of the memorandum make a mental review of the steps which they were taking to bring about an understanding of the respective mills and their problems in the community. The memorandum concludes, "The unions are going to be making a tremendous drive all through this area, and there are few things that are more important to us than making sure that the leaders in your community understand and are sympathetic to what you are trying to do." This memorandum is not to be analyzed as if it were a document prepared after thorough study of its every word and implication and their legal significance. Milliken's interest in all of the mills is not to be regarded as Deering Milliken's (of which more *infra*) and certainly does not prove single employer status. But even a technical analysis here could show only the distinction between the importance of the matter to "us" while "you" are trying to do the things which need to be done. So far from proving Roger Milliken's or Deering Milliken's control "in dealing with the problems of labor relations and of unions" (in the words of the Union's brief), the memorandum indicates rather that those problems were handled by the mill treasurers and that Milliken was here "alerting" them and pointing out to them an area in which he believed that *they* could function.

The exhortation in the magazine is addressed to textile mills throughout the industry. No more than this indicates

a single employer status throughout the industry does Milliken's distribution of the article indicate single employer status among that Deering Milliken mills. The call for "contact on a local and national level for larger firms, operating in several areas" reflects the magazine's impression that there are larger firms which operate in several areas; it does not prove the existence of such firms or that the corporations before us constitute one of them. What is then pointed out concerning "Darlington officials who decried the utter lack of any attempt at public relations before, during or after" the union campaign would be as applicable whether or not Darlington were part of a "larger firm." Thus there is no evidence here that Darlington was part of a larger firm and certainly no proof of multiple plants in a single employer status. Hence, aside from the question whether Milliken, by distributing the article, adopted its remarks, there can be no question concerning the significance of the remarks themselves.

On the right hand column of the article's second page as reproduced and distributed is an editorial. This declares, "If the people of Darlington knew anything of the Deering, Milliken record they would know that management does not intend an unprofitable division, nor has it intended to share the prerogatives of management with labor union leaders." Milliken testified that, although he distributed the editorial, he did not subscribe to all of its statements; he undertook to explain why he could not subscribe to the sentence just quoted. In fact, the General Counsel stated his belief that the editorial refers, not to Deering Milliken's management, but to the various mills. After pages of testimony and discussion on the record, we thus conclude with not even the claim that this refers to or tends to prove single employer status. Whether correct or not in his estimate of the value of the article and the editorial (and the Newsletter), Milliken sent his memorandum out because he believed that these

called for action by "all textile mills," not as noted after review and expert advice concerning the legal significance of the statements therein made, as one can believe and even reasonably assume.

Time and again, as we received in evidence memoranda recommending action by Darlington, it was shown that Oeland rejected the recommendations. An exhibit most directly related to the violations heretofore found is a letter dated 1 month before the September 1956 election, in which Oeland indicated that he had decided and was carrying out his plan to "fight the union's activities"; that he had so informed Poag, Darlington's attorney; and that he had gotten Poag's approval to continue. Such "approval" of an important policy already adopted by Ooeland does not indicate that Oeland's was a subordinate position.

Also in evidence are communications in which Oeland requests or anticipates "approval." But it will be seen that in those cases his reasons were generally accepted as convincing, and the approval forthcoming. Certainly his rejection of advice from others stands undiminished in significance. In one of the letters last referred to, he persists, in a recommendation contrary to advice from Poag; and quite confidently in tone, as if the decision had already been made, submits it for Roger Milliken's approval ("I would like to have your approval before we move in the matter"), still looking forward to Poag's approval, which certainly does not appear to have been any *sine qua non*.

Thus it does not appear that Darlington was under compulsion to join in various efforts, whether purchasing, selling, operational, or that it was not free to terminate the relationships which existed. The record shows that from time to time mill treasurers took action or made decisions vis-a-vis other Deering Milliken mills or corporations. It does not appear that those actions or decisions were controlled by Deering Milliken. Time and again correspond-

ence submitted in evidence to show control indicates rather that suggestions were submitted, received with "appreciation" by the mill treasurer, and by him accepted or rejected. Nor is there evidence of conflicts of interest between Deering Milliken and Darlington which were resolved against the latter. We shall see that the evidence does not show loss of separate identity, permanently binding and exclusive arrangements, single employer status, or liability of one corporation for the unfair labor practices of another.

The functions of purchasing of equipment and material, personnel recruitment and advice, sales and its concomitant of styling, tax savings, etc., etc., are as vital to the proper conduct of textile manufacture as is the role of an egg in an omelet. If the egg is not obtained from one source, it will be from another.

In some cases the poultryman may employ and direct the cook in a truly integrated and single entity status; he may even be the consumer. But use of the egg and acceptance of the advice do not prove employment of the cook or control over him by the poultryman. For this we must look to factors which do prove control. The role of the egg is not a whit less important where the poultryman and the cook are quite independent in their decisions and actions. The former, with knowledge of his product (or the market), may be in a position to advise concerning its optimum use. The latter may well adopt the advice; or, having received and even sought it, he may reject it. Advice and assistance are one aspect; control is quite different even if the advice is so clearly good that it would be foolhardy to reject it and it is uniformly followed.

In the instant case it is clear from the evidence before us that, however frequently advice from Deering, Milliken, DMSC, DMRC, other mills, or Roger Milliken was adopted, it was not uniformly followed by the various mills or mill treasurers, or specifically by Darlington or Oeland. This

should be sufficient to refute the claim of control inherent in single employer status. But we shall go further and consider various instances which may suggest control (even if we thus ignore the plausible argument that elements which are among those which exist where there is control do not prove such control in the face of the denial and absence of other elements which cannot be denied and must be present where there is control).

Leaving for later consideration all comparisons with other factors and their relations with mills which they represent, we must consider the significance of such terms as "DM mills," "our mills," "our organization," "mills affiliated with Deering Milliken." It was testified that in industry parlance, mills are referred to as XY mills where XY is the selling agent or factor but has no other financial interest and the mills are independently owned. Thus mills which are alleged to be recognizably independent and do not occupy any single employer status are referred to as Cannon mills, Iselin-Jefferson mills, etc. (We shall later note the facts and actual relationship among mills within such groups.) At least partial explanation may be found in the testimony that an advertising agency pointed out the difficulty in acquainting the public with multiple names, and advised that in advertising even "Deering Milliken" should be avoided, with emphasis to be placed on the single name "Milliken."[18]

Analogous situations in other industries were noted: AMC stores being a group of independent stores or chains banded together for buying economies; CBS radio and television stations, very few of which are owned by CBS, the others being financially independent; and Howard Johnson restaurants, where the outlets are individually and separately owned, the name being used for advertising purposes and to

[18]One aspect of this single-name emphasis will be considered *infra* in connection with an exhibit entitled "Fabric Magic by Milliken."

indicate that a uniform type of operation is maintained. Here, as in Romeo and Juliet, one can ask, "What's in a name?" This does not dispose of the issues before us. But it serves the negative purpose of showing that use of a name jointly does not show single employer status. Decision must be based on such other evidence as has been offered. In this consideration of impressions and descriptive references as distinguished from proof of actual control and status we can note that there is no evidence that the employees of Darlington ever considered or referred to themselves as employees of Deering Milliken or of any of the other mills or mill corporations.

As I stated in overruling an objection made on the ground that certain exhibits offered by the General Counsel were immaterial since they did not support the proponents' burden of showing integration, proof of given activities which do not show integration is material to the issues before us, especially where such activities and proof are extensive; for to the extent that these activities, although they might be of such a nature as to show single employer status, do not show that status, they tend to deny its existence here and limit the possibility of a finding in conformity with the Union's proof. Similarly, as the General Counsel touched on possibilities which, were they in existence, would tend to show single employer status among these corporations (guarantee by other corporations of a loan to one of them, to cite an example), the fact that the relationship or activities thus inquired into were nonexistent tends to indicate that there is no single employer status.

Activities indicated among the corporations here, which characterize the relationship among factors and independent companies which they serve or among cooperating but independent companies generally, tend to show an independent status here. In fact, I consider the relative number and the nature of the activities which are common among in-

dependent companies if no attempt was here made to list all of such activities;[19] as on the other hand I consider the number and nature of activities which are not usual in independent relationship but which did characterize the relations here. The Board may prefer a different statement of the rule be applied here. But however the basic principles be declared, the fact is that the activities and relations among the various corporations do not show a single employer status.

We shall soon note items which most nearly of all those submitted suggest single employer status; these are few and certainly not determinative. The most persuasive are scarcely, certainly insufficiently, so. Our task would be greatly simplified could we point to certain items as clearly probative of single employer status;[20] i.e., that certain items exist here and where there is single employer status, and are never present where there is no such status. (We have already mentioned the importance of showing centralized control, especially of labor relations). But we are unable to do that. Neither can we, nor need we, prove the universal negative.

As presented on the record, certain evidence immediately suggests independent status. (Such evidence is in contrast with items which do not indicate either independent or single employer status, and those which suggest the latter.) Thus there were suggestions to Oeland and other mill treasurers from Deering Milliken, some of them adopted, others rejected, the decision in each case quite evidently made by the mill treasurer. To cite one instance, a letter to Oeland from

[19]Admittedly there were many contacts among the various corporations here which did not suggest to the General Counsel in his prehearing investigation a single employer status.

[20]Certainly in the lengthy oral testimony and the many exhibits there are no one, two, or five facts which can be relied on as proving the General Counsel's case. This is attested to by the length of the briefs in support and the number of items relied on therein, and it makes necessary a voluminous analysis of many items which are not probative in lieu of recognition of a few which might be.

Deering Milliken's order department transmitted a suggestion by Roger Milliken that the mills apply bale numbers to lessen warehousing problems. Declaring that Darlington had no problem in that connection, Oeland closed his reply as follows: "We appreciate your *willingness* to *work with us*, and if the occasion arises we will take it up with you." (emphasis supplied)

Again, a suggestion from Deering Milliken's Controller's office that the fiscal year end on Sunday, November 27, 1955, instead of November 30, was followed by the mills only after the respective Board of Directors decided that it was "a good idea" and adopted it. A Standard Practice Instruction was thereafter issued to the mills by the Controller, setting forth the dates to be used in closing the financial records of the corporations whose fiscal year ended on November 27. Although as peremptory as administrative details are when reduced to writing, the Instruction reflected the decision already made by those corporations.

Thereafter Smith, the vice president in charge of Deering Milliken's credit department, asked Oeland to what extent Darlington's large credit could be reduced to demand notes to be left at least through November 30, 1956, almost 7 months off. Oeland replied that, after analysis of its cash requirements, Darlington could invest only a small portion for the entire period although it could, if so desired, put an additional amount into notes to be liquidated when Darlington needed cash. Clearly the decision here was Darlington's, with a further tentative and indefinite commitment by Oeland. From Deering Milliken came a suggestion; from Oeland a limited agreement without further obligation. Smith's reference to Darlington's "current account" was to its balance at Deering Milliken; his concern was not with Darlington's balance sheet, profit and loss statements, or other accounts.

Further evidence of Darlington's independence is seen in the testimony by Minot Milliken, Deering Milliken's

treasurer, that he lacked information concerning Darlington's property records, has nothing to do with such records at the mills, and is not acquainted with the form in which the mills maintain records. He also testified that Darlington's stock transfer registry had been at the mill in Darlington, that stock transfer questions were referred to Oeland, and that the latter in turn referred legal problems to counsel in Darlington.

Because of the emphasis on the question of centralized control of labor relations in cases involving violations of the Act and extension of liability for such violations, our inquiry should devote special attention to the labor relations of the various corporations which allegedly occupy the single employer status. But here the proof of uniformity is meager indeed. Hours and conditions of employment were determined by each mill for itself, and there was no uniformity among them. The so-called Deering Milliken Vacation Plan has been cited as a common labor policy referrable to Darlington and other mills. Pacolet, one of the mill corporations, conceived a vacation plan, discussed it with Kable, the head of Deering Milliken's tax department, and sought the best tax counsel available before applying for and obtaining a beneficial ruling from the United States Treasury Department. The plan was proposed or submitted to other mills, and thereafter it was up to the Board of Directors of the respective corporations to adopt a like plan to the extent applicable. This is the testimony as received; an exhibit in evidence declares Oeland's understanding of the advice to Darlington's Board of Directors in this connection by Kable's office so that the vacation plan previously in effect at Darlington might be continued without imposition of any change by an Internal Revenue agent.

To the extent that an inference of a common or similar vacation plan might be warranted, the evidence of common joint activity here is entirely consonant with and indeed in-

dicates independence [21] of decision. If some mills used a substantially similar vacation plan which was given the Deering Milliken label, control over the mills is not thereby shown. Here, further, the changes initiated by Pacolet merely assisted Darlington to continue what it already had in operation. Minot Milliken testified that he believes that the mills have various plans and that no one at Deering Milliken is acquainted with all of those.

Another plan which bore the Deering Milliken name, and was adopted at some of the mills, is the Deering Milliken Mills Retirement Plan (to be distinguished from the Deering Milliken Retirement Plan in effect at Deering Milliken itself). All of the mills' salaried employees are covered by the mills' retirement plan, and during the course of a discussion some of the mill treasurers wanted to know what the additional pension cost would be to each mill if their second hands, paid hourly, were put on salary. Lowry of DMSC thereupon called on the mill treasurers for such information as age, salary, and length of service so that the cost could be determined on an actuarial basis. The actuary's report was then submitted to the mills, each of which then decided whether to extend its retirement plan: some did, others did not. It was further explained that each mill adopted the type of plan which it preferred. The plans are grouped as the Deering Milliken Retirement Plan for purposes of investment, but lack that uniformity which a single control would dictate. That there are no differences in options among the various mills no more proves integration among the mills than does provision of similar plans by various insurance companies indicate integration among the latter or their insured.

There is nothing to suggest that the inquiries which initiated the retirement plan studies could not have been

[21] This factor distinguishes the instant case from *Bethlehem Steel Corporation* v. *N. L. R. B.* 120 F. 2d 641, and similar cases cited by the General Counsel.

made elsewhere. But here was a convenient source of information. If payment had to be made for the time spent in obtaining advice, it was presumably cheaper when put on a mass basis. As in the case of other tax assistance, *infra*, the same firm of tax specialist attorneys was called in. The extent of cooperation among the mills does not lessen the evidence of their independence. It will serve no useful purpose to describe all other examples of cooperation, with independence of decision, which indicate independent status. But other instances will be introduced by reference to the respective claims herein.

Wages are a most significant aspect of labor policy and relations. That aspect here does not indicate single employer status. When Darlington's wage rates were considered here and at the original hearing, it was testified that they were different from other southern or South Carolina mills. Comparison was thus general, and there was no suggestion of similarity or even comparison with other Deering Milliken mills although references were made and comparisons with them were attempted in other respects. In short, there was and is no evidence of a common wage policy. Uniformity has not been shown, and Oeland now testified that piece and wage rates and premiums at Darlington differed from those at other Deering Milliken mills. He made changes in wage rates after discussions with the overseers and superintendents; he did not consult Milliken, Deering Milliken, DMSC, or DMRC, nor does it appear that he was governed by any recommendations from these latter.

Labor policy (in fact the very events which preceded the violations found) was directly involved when in August 1956 Oeland called on his friend Glenn, employed as director of industrial relations at Monarch mills, to advise him in connection with the organizing and election campaign at Darlington. In his Newsletter of September 28,

1956, Oeland informed Milliken that Darlington had paid Glenn for his expenses and had reimbursed Monarch for the time during which he had been away from his job there.

There was no intercorporate relationship here. Neither Monarch nor Glenn was under obligation to assist Oeland. The latter called on his friend Glenn and thereafter sent him a check in appreciation. This episode reflects on several items which concern as: the personal rather than corporate relationship, just noted; Oeland's authority on behalf of Darlington; and the latter corporation's responsibility as quite separate from that of Deering Milliken or Milliken personally, with whom Oeland did not discuss Glenn's services until after they had been rendered, although Oeland believed that he had informed Milliken in a Newsletter.

We are also asked to rely on so-called striking similarities, with some sections identical, others almost so, between the Darlington employees handbook (which had not been distributed since at least 1951) and handbooks at Judson, Drayton, and Monarch mills as indicative of single and overall control of employee relations. These similarities have been minutely detailed by the Union.[22] The handbooks have not been copyrighted. As we shall again note, good ideas are not to be discarded merely to be different. Whether other Deering Milliken mills besides these have handbooks, whether any such are different from those here referred to, whether handbooks at outside mills are similar, we do not know. The similarities indicated are not probative; they have not been shown to be characteristic of Deering Milliken mills and exclusively so, nor do they meet the objections pointed out in connection with other evidence received, that they are consistent with both single employer

[22]On behalf of the Respondents it has been argued "That no two of these employee handbooks are alike" and that there is no basic uniformity among them.

and independent status. Here as elsewhere, while various similarities do not prove control, dissimilarities are significant.

A most meaningful and important element connected with actual operation of these mills and their factor, is their competition in constructions. Under an integrated or single employer operation the various mills would make constructions which would complement one another and together constitute a full line; they would not compete in given constructions. Yet the testimony is that Darlington had lost business to other mills, either Deering-Milliken or non-Deering Milliken mills, because it had not been able to produce wider goods. May, Deering Milliken's vice president in charge of print cloth sales, gave advice, as requested by Oeland, on the basis of his ability to forecast sales so that the mill could plan its production with that in view. This followed by about a month an inquiry from Monarch's treasurer to Oeland concerning a certain construction which was too wide for Darlington to handle. While cooperating with Monarch, Darlington took steps to handle such constructions itself by acquiring wider looms. With respect to a market for wider material which Monarch mill was then producing, there was no question of subordinating sales of any such widths which Darlington might manufacture. In fact, before its liquidation (this was cited in connection with the earlier findings of violation), Darlington had begun to install wider looms.

Detailed as was the examination of production records and of witnesses concerning constructions manufactured by the various mills, there is no evidence that one mill avoided a given construction to favor another mill; or that competition among these mills in their manufactures and attempts to sell was restricted as by existence of a single employer status. We have just seen that there has been no centralized control of labor relations. We shall note *infra* that it

does not appear that, when it was liquidated, Daslington's constructions, accounts, and orders were transferred to the other mills as mere successors or *alter egos.*

Not only can it be said that the proof does not show integration among the various mills in cloth manufactured; in fact it appears that they are competitive since given constructions have been through the years made by more than one of them. There were requests for information and advice concerning possible competition but in all the mass of evidence before us there is none which indicates deference by one mill to the profit-making interest or intent of another in purchasing, manufacture, sales, etc. Yet harmonization and deference would characterize a single employer status existing directly among the mills or indirectly through their respective relationship to Deering Milliken. While deference or enforced limitation on manufactures would indicate single employer status, availability of and requests for information and advice do not.

The point was noted at the hearing and later argued that Deering Milliken control was exercised to the extent that acceptance of a product as premium depended on salesmanship. But this a common aspect of salesmanship; to this extent it may be said that every salesman "controls" his principal or determines its success. There is no evidence that Deering Milliken or its salesman preferred one mill to another, and certainly none that one mill was compelled to defer to another in either manufacture or sales.

The mill treasurers' independence in deciding what their mills would make has its counterpart in their independence in sales policy. Some are "free sellers," making sales commitments well into the future while others, more conservative, sell for early delivery; and in some instances a long term policy is adopted on certain constructions and a short term on others. There is no control of one mill by another in this respect, nor any overall control by Deering Milliken or Roger Milliken. There is testimony that

"(t)hese treasurers were highly competitive in their outlook. And if they could see that one treasurer had achieved something at one of his mills they felt that they probably could do likewise." This suggests the absence of restraint on their competitive and self-favoring outlook, which might have been exercised by a central control.

It is true that the industrial engineering department of DMSC worked with the smaller and more limited industrial engineering departments at the mills; and when the mill treasurers at their meeting agreed that each mill would work on a certain project involving mechanics of production and that they would later exchange information to improve production, DMSC's IED advised the mills' i.e.d. concerning the course the project should take. This cooperative effort among the mills was typified by assistance given by Darlington to Gaffney in connection with specifications for high speed looms. Another instance is the exchange of information, which we have just noted parenthetically, between Darlington and Monarch concerning a construction which was too wide for the former's looms. Such interchanges of information, like other activities of mutual benefit, have not been shown to have been forced on Darlington or any of the other mills. Rechecks of competitors' cloth were performed at some mills at the request of the mill treasurer, the charge being made to the requesting mill. A further element of cooperation enters where more than one mill benefits from a given recheck; there is no joinder in sharing the cost but the purchases for recheck are scheduled to accomplish that objective. That the liability of each mill was based on the service performed for it is further indicated by a later proportionate billing for an accumulated rechecking deficit.

A further example of cooperation between DMSC and Darlington is seen in Roger Milliken's suggestion which prompted Oeland to write to Defore, who is in charge of

the fiber quality control and research department of DMSC, for information concerning certain frames. This does not show any control of Darlington from without; Roger Milliken was its president.[23] If we heed the argument that he was also president of other mill corporations and of Deering Milliken, and that these facts, with the stock ownership shown, prove single employer status, we have wasted a great deal of time in this hearing; those facts were known before the remand order issued.

As for Milliken's activities on behalf of the various corporations, the emphasis given that in the briefs is misplaced: the issue is rather one of control of one corporation by another or of common policy so established and exercised as to indicate single employer status. The "relationship" abundantly instanced by the General Counsel is not one of control of mill policy or activity generally or of labor relations specifically. To cite suggestions by Milliken to the mills as illustrative of his control[24] may mislead anyone whose attention is not called to the testimoney that those suggestions were reviewed by the mill treasurers, that decisions were separately made by the latter for their own mills, and that the proposals were in many cases not adopted; also that in many cases, Milliken did not even receive replies from the mills to his suggestions or requests for information. So much for possible "impact" on mill personnel of Milliken's attempts to follow up on his proposals or "to make sure" (quoting the General Counsel) of "some thought" at the mill level. Whatever Milliken's ideas and the scale of his thinking, control is exercised at each mill. As spread on the record and even as described by the General

[23]Despite Milliken's desire that the frames be bought, they were not.

[24]The General Counsel does not strengthen his position with respect to either violation or remedy when he leaves the concept of control and notes that "chain operation" is here indicated. This aspect is considered *infra*.

Counsel, Milliken's proposals appear to have been more nearly precative than authoritative.

Nor need more be said here than was said at the hearing concerning a pencilled draft prepared prior to filing of a report with the Federal Trade Commission, the draft having been found in Darlington's files. Darlington's accountant (bookkeeper), who evidently prepared this draft for the period immediately preceding the company's liquidation, checked item 4 of the printed form, thereby indicating that Darlington was a subsidiary of Deering Milliken. While this draft is properly before us as a record, even if erroneous, prepared and kept in the regular course of Darlington's business, it is relevant and necessary to note that correction or change was made prior to filing with the Federal Trade Commission so that as filed the report declared that Darlington was not a subsidiary of any other corporation. Attention to this item can only emphasize self-serving statements which do not help carry the General Counsel's burden. The report thus filed was the last of three; and those for the two earlier periods likewise recite that Darlington was not a subsidiary of another corporation.

Some items, although presented in detail at the hearing, are quite equivocal[25] on the question of independent or single employer status. We have already considered vacation and retirement plans. On another aspect of employee relations, an employee of one of these corporations is occassionally made available to another, the change in most cases being from DMSC to a mill as when a mill seeks the full-time and permanent services of a DMSC employee who has advised

[25]The General Counsel appears to recognize this as he cites a window-cleaning analogy to show that performance of acts by independents does not "disprove" relationship. But the need here is to *prove* the relationship alleged by the General Counsel and the Union; and this is not done by a mass of evidence which does not disprove it. As noted, we cannot substitute such evidence for the necessary proof of control.

or otherwise assisted it. But this is not an unusual procedure between independent consultant organizations and companies which they service, and even between business firm and their clients. Specific reference in the record to several employees (in the generic sense) who were employed by more than one of these corporations may be recalled. Thus Oeland had himself been controller at Monarch when in 1951 he accepted the position of treasurer at Darlington. The former treasurer having decided to retire, Robert Milliken discussed the change with Oeland. While formal employment arrangements would be handled by the Board of Directors, it was natural that the president of the Company should discuss the matter with Oeland. If we must search out every possible basis for inference, it can be noted that Milliken did not as president of Monarch seek out Oeland; William Sibley, Monarch's treasurer or manager, told Oeland that Milliken wanted to see him. Oeland's tenure at Darlington depended on his success there, and he was so told; but he was also told that he was to be in complete charge and that, whether or not he sought advice, the responsibility for decisions would be his own.

Before any conclusion can be drawn from this employment sequence from one Deering Milliken mill to another, we must consider whether it is more significant than Oeland's earlier move from a non-Deering Milliken mill. It does not appear that in either case there was more than an individual's natural and successful attempt to obtain a better job. The relationship between the different companies was no more nor less independent in the one case than in the other.

Other testimony showed that Allen Sibley, vice president of Pacolet, designated officers of some of the companies (not Darlington) to be general manager of other Deering Milliken mills. Positions as manager of some of these mills were also made available to a few top supervisors of other

Deering Milliken mills. On the other hand, managers and top supervisors were in about equal number taken from companies outside this group.

These and other instances of which we have details do not indicate that general transferability or maneuverability of Darlington's employees which might characterize a single employer situation. Voluntary cooperation is as readily understandable here as in other connections: not only does the new employer gain the employee whom it seeks, but the former employer creates an incentive for others who might likewise be interested in change and improvement of status. Whatever the relationship among some of these companies, in none of these instances does there appear to have been any overriding control by another corporation over Darlington in the change of employment.

If, as counsel for the Union argued with reference to some of these mills other than Darlington, "the exchange of employees in all of the respondents held (sic) to be included in the single employer status is one of the paramount facts that determines whether there is a single employer status," the showing here is weak indeed; and without consideration of the argument by counsel for the Respondents that, whatever movement from one company to another (other than Darlington) may prove with respect to their relationship, it does not bring Darlington into single employer status with them.

One change which, because of the language employed, might be listed *infra* among the items which do suggest single employer status, is the "promotion within the Deering Milliken mills" of W. H. Stallworth. Using these words in a memorandum, Oeland explained that Stallworth, who had been card room overseer at Pacolet plant, had been made production superintendent at Darlington. Conceivably Oeland was overenthusiastic in stressing the element of incentive. Certainly nothing in this change of employment except Ocland's language in describing it indicates a single

employer. The same memorandum declares that Mullendore, Darlington's former production superintendent, had accepted a position with a cotton mill in Georgia, not one of the Deering Milliken mills. Aside from Oeland's language, Stallworth's change of employment no more indicates a single employer relation between Darlington and Pacelot than does Mullendore's indicate such a relation between Darlington and the mill in Georgia. Here it may be pointed out again, as at the hearing, that the evidence which is cited as characteristic of single employer status must likewise be incompatible with independence if the General Counsel is to prevail.

Later, when Oeland informed Lowry on a visit by the latter to Darlington that Stallworth was not satisfactory as production superintendent, Lowry declared that he could use Stallworth's experience in the IED, and hired him. Thereafter, writing to Stallworth concerning cancellation of his incentive bonus, Oeland refers to his having been "transferred to D. M. I. E. D." Here again we are concerned with the accuracy of Oeland's impression or the accuracy of his use of terms. We shall see *infra* that there was no "D. M. I. E. D.", but as referred to above, an IED at DMSC.

Immediately thereafter Oeland wrote to Lowry concerning "transfer" of Goodwin, DMSC employee, to succeed Stallworth as production superintendent at Darlington. This was after Oeland and Goodwin had talked and "come to an understanding" concerning the latter's new job. Johnson, who in 1951 started in the placement department which functioned for some of the mills (the record is not quite clear on this point), became personnel manager at Judson mills. When DMSC was set up, he became head of its placement department. Thereafter he returned to Judson mills as its personnel director. Lowry testified that one of his industrial engineers, Hubbard, had prior experience at Judson mills. But at the same time it

was brought out that Lowry's assistant, Moss, had come from a subsidiary of Owens-Corning Glass. There is no indication that any more significance attaches to the change of employment of the one within the group of corporations before us than to the change of the other from an "outside" corporation.

More generally and in the main perhaps on a lower level than most of those just mentioned, it was testified that in 1955 and 1956 approximately 10 IED employees of DMCS had gone to work for mills selling through Deering Milliken; and that perhaps 2 or 3 had gone from the mills to the IED. There were also hirings from and losses of men to other mills. These changes in employment do not show single employer transferability. Kable, secretary and assistant treasurer of Deering Milliken, testified that neither he nor any of his employees had had any prior background or association with Deering Milliken mills. Not for any lack of effort is the number shown so small. I have not overlooked, in the testimony concerning the functioning of the placement department, reference to mills' occasional inquiries whether other mills and available employees with certain qualifications. The significance and the results of such inquiries are presumably to be seen in the evidence of transfers or changes noted.

Another item which called for explanation and was explained is the statement in a letter from Oeland to Milliken on October 12, 1956, that D. M. I. E. D. "agrees to carry for a period of 3 months after their separation from the Darlington payroll" 16 office and supervisory personnel. It was testified that Lowry had said that he had work for them and that the mills which DMSC serviced would want any whom he could not hire since the mills were always looking for qualified people; and these were qualified Darlington personnel. (This was never effectuated; except for Goodwin, *infra*, the men got jobs elsewhere.) It

appears also that after it had been decided to liquidate Darlington several of its supervisors and staff employees were given time off to visit other mills, both Deering Milliken, and outside, to see whether they could get other jobs. As he testified concerning this, it did not appear that Deering Milliken mills stood out in Oeland's memory or that they were his special concern.

A single employer status would perhaps be characterized by a transferability of employees which does not exist here. Certainly the evidence adduced by the General Counsel in this connection does not show such status. Nor could an appropriate unit be found which would include employees of the various corporations who perform like or related tasks. There is no proof of a common labor force or a uniformly managed labor relations policy.

Memoranda prepared by DMSC which permitted comparison of the mills with respect to annual labor turnover could, like the demerit system employed, be examples and an incentive for improvement. Similar information was obtained from the National Industrial Conference Board and other patently independent sources, and it can no more be held that comparison with other Deering Milliken mills indicates single employer status among them than that comparison with other companies and other operations indicates single employer status with such others. Trade associations, whose members do not jointly occupy single employer status, prepare and distribute such information. Here again we have no evidence that DMSC or anyone else outside a given mill corporation "got after" the mill treasurer or otherwise exercised or attempted to exercise a measure of control. The mills received unemployment insurance memoranda from DMSC; they also received trade association and independent consultants' memoranda and bulletins. All were advisory, and the weight to be given them was determined at each mill for itself. General circularization

of all of the mills when only one mill treasurer sought information and whether or not the information was applicable to the other mills or was desired or used by their treasurers represented DMSC's own interest in such matters and its desire to be helpful. Trade associations act similarly.

Cooperation in changing employment and questions in that respect developed at various times. Of greater significance was the question of possible transfer of Darlington's supervisory personnel at the time of liquidation. Oeland made recommendations and Lowry indicated which men he thought would be useful, with the expectation that they might be picked up by other Deering Milliken mills or by DMSC. Some 10 or 12 men were listed but, except for Goodwin, who returned to DMSC, apparently none were picked up by the other mills or DMSC.

We need not undertake to prove a universal negative or the nonexistence of all conceivable factors whose existence would prove single employer status. But to the extent that certain factors have been pointed to as indicative of integration, such factors, as we have seen, can be cited and the finding made that they do not support the General Counsel's and the Union's position. Thus while a marked degree of interchange of employees between Darlington, Deering Milliken, and Deering Milliken mills would suggest integration and constitute a factor for finding single employer status, no evidence has been submitted of interchange beyond that which may well characterize cooperating but independent corporations. Clearly there is no established system here of a course of interchange of employees. The occasional hire by one corporation of an expert employee who had served one of the others does not even suggest single employer status. The situation is no more frequent here or probative than is a company's employment as officer or house counsel of an attorney who has previously served it as an independent practitioner or member of a law firm.

Leading to the subject of recruitment and training of employees, which we shall next consider, but also connected with the element of transferability of employees is a memorandum from Johnson, when he was head of DMSC's placement department, to Oeland. In this memorandum Johnson suggests the possibility of "borrowing" a trainee or part-time student from Pacolet, "sharing" a man with another mill, or of using someone from the IED or the Cotton Department "on a special assignment" basis. Whatever impression of close relationship is thus created is largely dissipated by Johnson's testimony, "They were just general suggestions of a line (of) approach"; that "employing" would be more accurate than "borrowing," and that he had not known of any such practice. Here again is an individual's impression of a relationship and his use of certain terms, without proof that the relationship in fact existed. (It must be noted that Johnson was suggesting; it was for Oeland to decide and act.)

Another memorandum from Johnson to Oeland, in March 1955, entitled "Supervisory and Trainee List," might well be included among those items which do suggest single employer status among the mills. Most of the memorandum might be considered to have been issued to obtain for DMSC's placement department more complete information so that it might be able to render better service to Darlington. But it sought, *inter alia*, information concerning "(n) on college supervisors at the level of overseer or higher who may advance within your mill, or are capable of assuming greater responsibilities in another D. M. unit." The memorandum declared the placement department's intention to prepare a list of certain personnel at all of the mills. It must be noted, on the other hand, that the possibility thus suggested of inter-mill transfers was not realized beyond the limited extent noted *supra*. Certainly here is no evidence of authority outside of any mill corporation to remove or other-

wise control the hire of any employee of that corporation. The services of the placement department, from the pre-interview stage through employee statistics, was advisory only. The mill treasurers decided whether to follow the advice and the extent to which the services were employed.

A Training Committee, which included several mill treasurers, the head of the Cotton Department, and the president of DMRC, was organized, and a proposed form of trainee agreement drafted which was sent to Deering Milliken mills in November 1955 with the request that they indicate whether they planned to use it. Some mills indicated an intention to pay trainees on an hourly basis; some, equivalent amounts as a monthly salary; and the rates were changed by various mills from time to time. Thereafter DMSC and Johnson particularly developed a program of interviewing college students and offered various suggestions, some of which were voluntarily adopted by some of the mills. Many of the suggestions were embodied in a formal training program which included job instructor training and job relations training. Without fully detailing the overall program, it will suffice to note that various mills then jointly, or singly on a reciprocal basis, sponsored meetings or dinners for potential recruits. There is no evidence that, in the exercise of these joint or reciprocal efforts, any mill deferred, voluntarily or otherwise, to the wishes of another. The mills were here as in other respects merely sharing expenses to accomplish what they could not separately manage.

To assist in making contacts at the various schools and getting better men as trainees, the placement department prepared a "College Recruiting Program" which suggested "points . . . to bring out when talking with the students."

The purpose here was to impress, and like the Fabric Magic book, *infra*, the overall organization was stressed. Under "Opportunities and Future," the following was sug-

gested as a point "to be brought out": "Man hired by one unit—not Deering Milliken—but is available to entire organization. Stress cross transfers mill to mill—staff to line, etc." Whether this suggestion was followed by mill representatives who met the students we do not know. The grandiose if hopeful aspect is clear in Johnson's testimony that the instruction that "(I)n no event should a man be invited to more than two of our mills for a job offer" was not observed. Johnson testified that it was up to the mill representatives to bring out what they wanted to bring out when they talked to the students. While the program and the suggestions made are evidence to be considered in determining the relationship between the various corporations, of greater weight are the facts concerning actual availability to the "entire organization" and "cross transfers" from mill to mill.

Nor, regardless of their number, are programs which are developed for submission and assistance to various companies indicative of single employer status among those companies which adopt or consider such programs. Thus, to cite one example, the American Management Association is currently sponsoring for various and unrelated companies a seminar on College Recruitment. That seminar, which is related to memoranda and certain activities described in this proceeding, refers *inter alia* to make-up of the recruiting team; examination of studies indicating work records of college students previously hired as basis for selecting current candidates; preliminary steps taken with college placement bureaus before interviews with potential employees; use of publicity; screening effectively before final job candidate selection; proper timing of interviewing trips; discussion of common errors from viewpoint of placement officer; what techniques are apt to work; preinduction and induction program of college graduates into company; continuing relationship between college and companies, etc.

The apparent complexity of this single nonmanufacturing, albeit important, item indicates the wisdom of a joinder[26] of efforts and of assignment to specialists.[27] But such joinder was without loss of authority to the representative mills; and the assignment did not transfer control. These are consonant with full independence of the respective companies. Except where a treasurer was acting for his own mill, not only were the recruiters limited to making recommendations to the mills, but their continued service was at the mills' pleasure. Experience in the industry must bring an awareness of similar complexities in many respects, and may lead to reference to specialists for advice: all without surrender of control and without creating a single employer status among the companies which thus call for an even pool their efforts to obtain assistance and advice.

Similarly with respect to advice concerning purchase of supplies and equipment and by Roger Milliken generally, if the latter or others, because of their experience and contacts in the industry, could offer suggestions to the mills, those suggestions provided the mills with opportunities for benefit at their own discretion. A delivery schedule prepared by DMSC's purchasing department and received in evidence was based on dates requested by the mills. The decision was not the purchasing department's and the mills could make revisions subject of course to the seller's agreement. In another memorandum from the purchasing department it is clear that its services are advisory only: although it concerned a technical problem, the decision ultimately lay with the mills, one of which had already decided on contrary action. Whatever the purchasing department's advice, it is

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[26]See "the Jointly Owned Subsidiary," Harvard Business Review, Vol. 37, No. 4 (July-August 1959), page 31, *et seq.*

[27]Whether or not "Macy tells Gimbel," independent business organizations (certainly independent for our purpose, of which more *infra*) do cooperate for mutual benefit; not only among rival athletic coaches are seminars conducted.

clear that there is no uniformity among the mills in the equipment and supplies used. It should also be noted that the testimony concerning activities of DMSC's purchasing department relates almost without exception to the mills. Deering Milliken has its own purchasing department.

On a different level, that of the production superintendents, the production superintendent of one mill inquired of his counterpart at another concerning some phase of plant supervision, did this reflect a spirit of helpfulness which might be reciprocated, camaraderie, or integration? What if personnel managers exchanged information, most of which would be commonplace at a convention of personnel managers or management experts so-called or a luncheon discussion among representatives of independent companies? Mill treasurers had similar meetings and discussions and exchanged memoranda; for more formal and technical advice a treasurer sometimes looked to outside consultants, whom he had to pay. Oeland also testified that he visited non-Deering Milliken mills and bleacheries from time to time, and he named more than a dozen such. Here presumably were other instances of cooperation, the extent and details of which were not spread upon the record.

From testimony that some of Darlington's supplies were sold to other Deering Milliken mills prior to the auction sale, one could jump to the conclusion that Darlington's assets on liquidation, or some of them, were sacrificed to other Deering Milliken mills; and on the next landing conclude that a single employer relationship therefore existed. But it appears that such supplies, returned to the makers or sold to other Deering Milliken mills where possible, brought about 80 percent of cost while approximately 20 percent was realized on similar supplies sold at the auction. Similar advantage accrued to Darlington from sale of cotton which it owned to other Deering Milliken mills after Truluck (*infra*) had attempted to dispose of it elsewhere.

It is true that, like others, the recruitment program as described in this proceeding was limited to Deering Milliken mills and was availed of by only some of them. But this reflects recognition of similarity of problems and the extent of cooperation among these companies in other respects. Cooperation is still cooperation even though it be limited as to the number cooperating (just as it remains cooperation even if certain steps in programming, manufacture, sales, and especially the decisional process are not included in the joint efforts). There is no evidence of compulsion on the mills to join in these programs. But had they attempted to do their own recruiting, training, testing, etc., the results would have been regressive and markedly limited. The General Counsel recognized this when he argued that, like Deering Milliken, DMSC provides "top flight specialists that the mills themselves, if they were completely independent, could not afford." His five word qualification is quite unnecessary since the mills' ability to enlist specialists cooperatively would in no wise be limited were they admittedly independent. We have in this argument an instance of what has already been pointed out as typical of the evidence received: that conditions are cited which are consistent with but not probative of single employer status.

Conceivably one of the mills might at some time prefer not to share with another certain information which it obtained in one of these joint programs. That, however, could only be at the price of developing the program without joint effort and support, which would be expensive and therefore impractical. But a practical limitation in the number of cooperating mills having been found, it is quite understandable that these mills preferred to limit that cooperation and exclude others. Mutual benefits thus accruing to Deering Milliken mills might constitute an incentive to continue their joint efforts; they do not prove single

employer status, control, or any element beyond voluntary cooperation.

Thus the New York Stock Exchange may counsel its members and advertise their services, and at the same time neither counsel nor advertise nonmembers. Membership there even provides a measure of control. Yet such assistance and control and the exclusion[28] of nonmembers therefrom do not create a single employer status. As much can be noted with respect to local unions, their so-called parent bodies, and their federations.

The various memoranda concerning recruitment and training, and the arrangements made indicate a wholly voluntary relationship among DMSC, DMRC, and the mills which joined in these plans. The breadth of recommendations by DMSC is not determinative of status; the area of actual cooperation among the mills was much narrower, and superimposed control nonexistent. Significantly, individual mill treasurers made their own selections among available recruits. Nor is the extent of cooperation shown so great as to warrant a finding that, however voluntary their acts, the corporations were in fact operated as a single entity. It should be added that, if the cooperation shown does not prove single employer status, certainly reference to such cooperation my memoranda to the various mills or to DMSC or DMRC, with copies to the mills, proves no more.

We have already noted the voluntary aspect when mills adopted suggestions which they received. Even if we were to ignore that aspect, do suggestions and recommendations by Deering Milliken to the various mills and adopted by the latter prove control and single employer status? What of the recommendations which were rejected?

Deering Milliken's quality control department, established in 1950, naturally sought to anticipate or avoid com-

[28]There is testimony that IED representatives of DMSC visited other mills for information, as an example of a wider area of cooperation.

plaints with respect to some of the finished products of the mills. Thus Darlington adopted "truth marks" (apparently common in the industry) so that material could be identified as to origin. To a great extent the quality control department functioned as the complaint adjustment department: Shotwell, who was in charge of quality control for Deering Milliken, tested material on a customer's complaint and then made a recommendation to the mill for settlement; but the decision with respect to settlement, whether or not to make an allowance to the customer, was the mill treasurer's. The credit and complaint adjustment services rendering by Deering Milliken to Darlington are not unusual procedures for factors or even independent sales organizations. Such services are quite understandable if only as designed to protect the agents' investment. If a single employer status existed, where outside of Darlington did control lie? To try to satisfy customers is good business practice. As much can be said for taking expert advice. There is no evidence that Deering Milliken determined Darlington's decisions in these respects. The record shows that at times mill treasurers did not accept the recommendaions made to them for resolving differences with customers, but settled on a different basis.

Thus with respect to customers' complaints concerning tar spots, each dispute was handled on its merits and by the mill treasurer involved. As in other matters, uniformity in handling would not prove single employer status: it might reflect independent decisions and agreement that certain methods are best. But the absence of uniformity suggests independence. Although the General Counsel argues that the significant fact here was that Deering Milliken was trying to establish a general policy for the mills, and that whether such a policy was established is unimportant, failure in such an attempt negates the concept of control; while the attempt signifies no more than a desire for proper

handling of complaints of all customers to whom Deering Milliken sold as sales agent. It is no reflection on Deering Milliken and no evidence of single employer status that, as the General Counsel declares, it "felt strongly about its position in the market and its reputation with customers." Such a "general policy," explains action taken as that which a responsible independent sales agent would take.

Standard Practice Instructions, prepared in the Controller's office of Deering Milliken and distributed at Deering Milliken and among the mills, might be regarded from their very title as indicative of control by Deering Milliken over the mills. But the testimony indicates that these are not instructions directed out of New York and to the mills. Rather, they are prepared from information received from the mills, and represent Controller Flanigan's understanding of what the mills have decided to do. Thus they constitute a confirmation and a handy and succinct reference guide for the mills, and at the same time information and a guide to interested Deering Milliken employees. What may suggest single employer status in fact here indicates independence. The Standard Practice Instruction referred to *supra* was thus explained.

To expedite resolution of disputes on long overdue payments, Flanigan sent a memorandum to mill office managers in which he suggested bookkeeping procedural changes and a procedure which it was hoped would move the mills to resolve such disputes more promptly. The factor's interest here would be evident. While the procedure involved a charge-back against the mill, the latter on settlement of the dispute received credit retroactively; and this procedure, it was testified, is common whether or not the factor owns stock in the mill. Deering Milliken pressed for early settlement of such disputes, but it does not appear that such settlement, sometimes by arbitration, was handled or determined by Deering Milliken.

A memorandum in March 1957, after the plant had been sold, from Flanigan to Oeland concerning assistance by the former in obtaining a reduction in a bill rendered to Darlington by a firm of accountants has been cited as proof of the status claimed by the General Counsel and the Union, and has been countered with the argument that it cannot show single employer status in 1956. While subsequent events do not prove earlier status, a later relationship may, on the presumption of continuity, suggest that the relationship existed before, in this case at and prior to the time of liquidation. But the later event noted indicates only assistance by Flanigan scarcely different from that which has already been noted and is far short of proof of single employer status.

In connection with the Deering Milliken Retirement Plan mentioned supra, a memorandum from Kable to Oeland refers to a recommended amendment to the Plan, and declares: "Please place this proposed resolution on the agenda of the next meeting of the Board of Directors of your corporation." If this last gives any impression that Kable was directing Darlington's action, it is quickly dispelled by the testimony that mill treasurers are themselves members of the Pension Committee which recommended the resolution; Kable was intermediary between them and the tax attorneys who prepared the resolution; and only after such resolutions were adopted by the mill's Board of Director (he did not "anticipate" such action) would Kable advise how many copies should be signed, etc. Here again a possible impression of control by Deering Milliken vanishes with evidence of independent decisions by the mills.

Let us turn now, to evidence which more nearly suggests a single employer status. (Opinions will of course differ as to the existence or extent of any such suggestion. Whatever disagreement may follow my selections from the record, I shall not aggravate it by attempting to correlate

importance with order or sequence.) In June 1956, Nielson, Pacolet's office manager, suggested to Flanigan that a new category be included in the mills' financial statement, and detailed his reasons therefor. Flanigan promptly forwarded the memorandum to Oeland at Darlington.

Nielson's reference to employment at various Deering Milliken mills and his suggestion that all mills be "consistent" would be characteristic of a single employer setup. But it must then be noticed that, in Nielson's words, "the accounting policy as far as what particular category of labor to charge them to varies drastically between mills." Here is apparent recognition that freedom of action existed. This is confirmed by Nielson's further statement, "We do not feel that we should go ahead with this, however, without all mills being consistent," in view of certain comparisons made between or among mills. Apparently Pacolet was free to "go ahead" but preferred not to for the reason stated. Nielson concludes with a request for Flanigan's comments and a check among other mills to see whether they are in agreement. This last, indicating the mills' independence, is underscored in a covering memorandum to Oeland, which Flanigan closes as follows: "If you are in favor of adding this category in your mill, we would appreciate hearing from you."

Reference by a mill office manager to employment and accounting policy at the various mills, his call for consistency, and the transmittal to Deering Milliken and then to Darlington—all of these gain our attention in this examination for evidence of single employer status. But the memoranda themselves indicate the voluntary aspects for Pacolet, Darlington, and the other companies. Pacolet's office manager may desire an integrated accounting system; someone else may propose an integrated noncompetitive manufacturing system. But adoption of these suggestions, much less their imposition, has not yet been evidenced.

The suggestion from Nielson to Oeland through Deering Milliken might represent the approach from one independent company to another through their mutual factor, or contrariwise an integrated relationship working "through channels." On the other hand, yet similarly, a direct suggestion from Nielson to Oeland might reflect a close working relationship which in turn might indicate either no more than such a relationship between independent companies or an integrated status. As if the absence of probative value in this either-or aspect of the evidence were not sufficient to show that it proves nothing, one can speculate on the extent to which protocol required that the office manager of one company should not directly approach the treasurer of another, even if this was at times done; whether contact could have been made through the Pacolet treasurer; and finally, what if any significance for us would have attached to any other procedure.

Again, in a long list of suggestions to assist the mills in their training program, Johnson makes reference to "transfers" and suggests that his IED employ a trainee for 6 months with the mill footing the bill. We have already considered the element of transferability and seen that Johnson used terms which, by his own explanation and from actual events, were inexact. No more than in the instance where Pacolet's office manager hoped for consistency in the mills' accounting do Johnson's ingenuity and thoroughness in distributing many suggestions which in fact he received from various mills prove a relation which did not actually exist. Further, the suggestion that a mill pay the salary of a trainee at DMSC's IED would not prove control or single employer status; nor does it appear to have been adopted. The General Counsel at the hearing called attention to 18 of the 40 suggestions listed by Johnson in a memorandum. I have examined all of these.

Oeland testified that the accounts at Monarch, where he had formerly been employed, had been in different form

from those which Darlington kept; but that all followed good accounting practice, and there were similarities, as in accruing expected expenses at the end of the accounting year; no routine had been established for the various corporations. Good judgment and business practice are not to be sacrificed merely to be different. Similarities may be fortuitous or the product of independent judgment or cooperation. We are still concerned with the question of control or that element of cooperation which belies independence. Certainly that Oeland "did draw on (his) accounting experience at Monarch in helping to set up" Darlington's accounts is neither surprising nor probative of anything here.

The General Counsel has also cited a memorandum from the office of Deering Milliken's Controller to Darlington's accountant, in which suggestions are made for changes in the financial statement forms. But any impression of dictation or central must be quickly dispelled as it becomes clear that this is but one instance of suggesting to the mills a helpful idea already adopted by one of them or suggested by some individual. This memorandum specifically poses the questions without making any decisions thereon. Minot Milliken testified frankly that copies of financial forms were sent by the mills to Deering Milliken as it was important that the mills' balance sheet items be known to it; Deering Milliken submits similar information to banks when it borrows from them.

The issue of extent of assistance as reflecting on the relationship of the various companies is raised by Deering Milliken's employment of Turnowski under Flanigan and Kable for a short time. It was explained that he worked on property accounts for proper handling taxwise of purchases of new machinery, consulting with mill treasurers as they attempted to modernize their facilities after World War II. The mills' property accounts were independently maintained at the respective mills, and Deering Milliken's treasurer, Minot Milliken, had no knowledge of them. But for a time Roger Milliken's interest in the mills was expressed

in the employment of Turnowski by Deering Milliken! This was Minot Milliken's explanation for Turnowski's employment. Although a small matter in itself, the possible significance of this temporary employment and the explanation given constitute in my eyes a challenge to my findings and conclusions herein. One could perhaps pass this item off as evidence of Deering Milliken's further interest in its principal mills' welfare instead of combining Roger Milliken's personal interest with this employment by Deering Milliken as Minot Milliken has. The situation can be viewed in a light more favorable to the Respondents if we recognize any factor's interest in the well-being of its clients and regard Turnowski's assistance as similar to the other tax assistance and that given in connection with production, sales, insurance, etc. That Turnowski's services were advisory rather than controlling is further suggested by the testimony that he did not have copies or summations of Darlington's property records.

As an exception to the time-spent basis for payment by the mills to DMSC for services which it rendered to them, the head of its cotton purchasing department, Truluck, received payment from each mill as a percentage of its production, such payments going through DMSC. (DMSC also purchases synthetic yarn for mills which use it.) This arrangement, entered into at different times with the several mills, whereby they pooled their buying of cotton so as to avail themselves of an expert in the field and carload freight rates, was voluntary on their part and does not appear to have barred them from freely purchasing elsewhere and under other arrangements. Although the cotton purchasing department could be and apparently was very helpful in buying for and advising the mills, neither Deering Milliken, DMSC, nor Truluck exercised control over the mills in this respect. The record includes evidence that cotton purchasers render similar cotton purchasing and related services to admittedly independent mills.

There are other instances in which a factor purchases cotton for mills in which it holds a stock interest and also for mills which are independent in ownership. Thus cotton purchasing arrangements do not tend to show either independent or single employer status. Nor is division of a limited quantity of a given quality among several mills which had ordered it significant: any purchasing agent, ethical and concerned with pleasing his principals, would do likewise. Further, with fluctuations in the cotton market, hedging by transactions in futures is common. The evidence indicates that the extent of such hedging here is determined by the respective mill treasurers and varies among the various corporations.

In connection with the erection of a central cotton warehouse originally planned to accommodate five mills which are within a 100-mile radius, it was noted that a DMSCIED memorandum first cites the savings contemplated for each of these mills, including Darlington, and then lists the total net savings to *all* of the mills expected to join in the project and the return on investment, again computed for all rather than for each mill. The suspicious circumstances here is the grouping of all of the mills. The savings to the respective mills would be considered by *each* of them were they indeed independent. In a case of overall control and single employer status, the total net savings and the return of the entire investment would take priority; and these letters items in the memorandum suggest that single employer type of consideration here. But (with the exception of Pacolet) the investment by each mill in the warehouse was in proportion to the quantity of cotton consumed by it so that with minor variations (some of the figures used were themselves estimates) the return on investment for all was and would be the same as the return on investment for each mill. Thus there is no lack of concern for the benefit to each participant but only a single overall computation which was

referable to each. This does not indicate single employer status, whatever the impression. (As in other instances, we must distinguish between a *prima facie* impression which may warrant further examination or questioning, and a finding when the facts are understood.) On the contrary there is one facet here which further suggests independence: Pacolet's treasurer "elected" to join this venture to the extent of only 5 percent of his cotton consumption.

Among the services rendered by Deering Milliken were those performed by its tax department, which Kable supervises. That department is responsible for the drafting and preparation of Federal and State income and other tax returns for Deering Milliken, and its services are also available to all mills which sell through Deering Milliken. The department's services are charged to the mills according to weighted hours spent, weighting being according to the salary of the person whose time is thus spent. It was in this connection Kable was made an assistant secretary or treasurer of the various mill companies; that status earned him no addition compensation, and he had no authority except to settle tax disputes with the consent of the mill treasurer. In effect his title afforded him recognition as he dealt on behalf of the mills with various tax authorities.

Kable had a $2,000 coverage in Darlington's group life policy and similar coverage with the other mills of which he was thus assistant treasurer or secretary. This was the maximum amount that any individual could carry under each policy, and all of the companies' plans were with one insurer, although separate. Here was an attribute of employment of Kable by each of the mills. But whatever the insurer's attitude, it is clear that Kable was not a mill employee. The mills could and did avail themselves of his services, for which they paid Deering Milliken; and while each mill could terminate his services for itself, they could not terminate his employment by Deering Milliken. Cer-

tainly the fact that he gave tax and other financial advice to Darlington does not prove single employer status between the latter and Deering Milliken. Tax counsel were called in from time to time and their advice transmitted to Darlington and other mills. Similarly the Darlington stockholders, through Oeland, selected an "outside" auditor from time to time. But neither tax counsel nor the auditor, despite the joint efforts thus made, was a Darlington employee; nor did the efforts of either create a single employer status. While Kable's efforts on behalf of the various mills are detailed and include lengthy discussions with tax officials, decision after his negotiations is in each case made by the mill treasurer. This is consonant with either independent or employee status; it would exist were there a single employer relationship among these companies, but it is not limited to and does not prove such a relationship or status. It may be well to recall at this point that, although Pacolet discussed tax aspects of its vacation plan with Kable, it sought advice from tax attorneys.

Presumably significance is claimed in the fact that Kable prepared in final form the minutes of stockholders and directors meetings to the extent that they referred to action taken which had a bearing on tax. But Oeland would first send to Kable a draft of such minutes after the action had been taken. Here again as in other matters the decision was made at and by the mill, Kable advised and otherwise assisted. (What is here said concerning Kable applies on a very small scale to barely mentioned advice by Kennedy, Deering Milliken's general counsel, with respect to an item in the minutes of a directors meeting. It appears to be Kennedy's function to have independent counsel prepare necessary documents for mill corporations, which he then passes on to the respective mills. Darlington's general corporate legal problems were handled by local attorneys in Darlington. Not in criticism of the General Counsel, but

as a reflection on the available proof, it may be said that the reference to this item constitutes straining at a gnat when there is no camel to swallow.) Considering the services performed by the tax department, no significance would attach to its possession of a copy of Darlington's by-laws. But some slight significance may be found in the fact that, as the Darlington liquidation developed, Kable noted that he did not have a copy of its by-laws, which he would need as tax problems arose. In January 1957 he asked the various mills to send him a copy of their by-laws. One would expect copies to have been maintained at the seat of government were this an "empire."

In more general terms, Deering Milliken interested itself in Darlington's taxes and year end dividends, as indicated in a request by Minot Milliken in September 1955 for Darlington's estimate of profits for that year so that a tax attorney might review it to determine Darlington's year-end dividend. Deering Milliken rendered a service in securing the advice of tax attorneys (who might not have been readily available to the individual corporations) for the mills, but did not itself become involved in any sense of control of dividend declarations. Nor did the attorneys, advising Deering Milliken mills and acting at their request, create a single employer status among them any more than such status could be held to include other clients of those attorneys.

Of similar importance to the factor are other financial details, including capital expenditures and commitments, depreciation, etc., and the amount available for additional capital expenditures or investment in modernization. But interest in these items does not prove control over decisions made or to be made with respect to such expenditures, and certainly not with respect to labor relations and policies. To the extent that it is prepared to help, a factor's or sales agent's interests lie with its principal's benefits.

If what is good for General Motors be deemed good for the United Sttaes, and what is good for Darlington be deemed good for Deering Milliken, such concurrence of benefit even if planned does not prove control or single employer status within the respective groups. (Any attempt to inject a political issue here is rejected.)

A related situation with respect to Deering Milliken Research Corporation was noted at the hearing. Organized on a cooperative basis in 1945, DMRC had been allowed only an 80 percent deduction by the federal Treasury Department. A new and more advantageous plan was then worked out by Kable and tax counsel, and submitted to and approved by Darlington's stockholders in January 1955. There is nothing significant to us in the fact that Kable explained to Oeland the details of the transfer of the certificates which was to be made and the sums involved. Similarly, when Darlington was liquidated, Oeland consulted Kable concerning the mechanics of redeeming Darlington's stock in DMRC.

Considering Kable's services to Darlington and the other mill companies, we are not warranted in finding integrated status because a consultant is employed over a period of time rather than *ad hoc*. It is clear from the evidence that these were consultant or advisory services without that element of control or dominance over decisions which would characterize a single employer status involving both the source of the expert assistance and the Company thus assisted.

Having referred to DMRC, we can at this time briefly note the testimony concerning its efforts in connection with the incoming parts inspection and maintenance and preventive maintenance programs of the various mills, together with a limited machinery purchase effort availed of by some of them. While anything done at a mill may impinge on the terms and conditions of employment, this work was not

so much in connection with labor relations or the terms and conditions of employment as with the industrial engineering of jobs and work procedure. With respect to each facet of the assistance and suggestions offered by DMRC, it was necessary to convince the mill treasurers even as the latter is the first place determined the activities to be considered by DMRC.

Payment to DMRC for its services according to sale or commission income, is entirely consonant with independent status. Where a given activity was of interest to only one mill, the charge therefor was made to that mill only, although such arrangements appeared to be loose. Comparison and even competition among the mills, with a demerit-ing system based on the condition of the machinery—all of this represents joint effort independently agreed to for mutual benefit. In one case, it was brought out, Oeland stated that he did not want the figures let out to other mills; McCullough, who was secretary of DMRC and was intimately involved in these programs, testified that he had to honor Oeland's request. With respect to a slubbing device which it owned and which DMRC had developed and sold to it, Oeland stated that Darlington preferred not to auction it off at the sale, and suggested that DMRC purchase it after agreement on the price. The inference that this meant a preference for other mills which maintained or contributed to DMRC is not warranted; in a letter 7 months before, Oeland mentioned Darlington's trial shipment of the device for sale to Burlington Mills, an "outside" organization.

In response to a request by Roger Milliken for a recommendation on the best methods for certain operation, DMRC replied that it had been working on a plan so that it could report to "mill management" on mill practices as well as machinery condition. The mill treasurers were of course interested in assistance. But it was testified that

they were sensitive about their mill practices. It does not appear that Milliken or DMRC could or ever did force on mill treasurers any changes in practice or operation. In fact the rating of the mills' maintenance systems was soon discontinued when the treasurers decided that it was not sufficiently meaningful to warrant consideration at their quarterly meetings.

Another and more serious question is raised by an agreement to make retirement or pension payments to Nicholson, who had preceded Oeland as treasurer of Darlington. On Nicholson's retirement in 1951, the directors of Darlington committed themselves to make monthly payments to him. With the dissolution of Darlington this commitment continued, but Darlington's obligation was measured by actuarial computations. The question arose as to what would happen if Nicholson outlived the actuaries' expectation. At this point Milliken suggested that Cotwool, another "related" corporation, pick up any payments which might be due to Nicholson should he outlive the actuaries' expectation. The director of Cotwool agreed to do this. In explanation it was pointed out at the hearing that Nicholson had at one time been employed by a subsidiary of Cotwool. Whether this last appeared to the Cotwool directors to create a moral obligation to assume the possible future payments, and if they thereupon committed themselves, the commitment is clear. This item does not show control of one corporation by another; but the element of cooperation is close and is related to the status of a former employee, albeit a top one and not an employee within the meaning of the Act. (The reference here is to the element of centralized control of labor relations.) This is certainly one of the General Counsel's "stronger" instances. That it is not probative reflects on or is itself a reflection of the nature of his case. An attempt to show further connection between Nicholson and Deering Milliken or these mills failed.

Reference was early made to the Deering Milliken Foundation, formerly the Deering Milliken Welfare Fund. This was organized for charitable purposes; Darlington and other corporations and individuals have contributed to it voluntarily. Once received, the funds are administered by a bank as trustee on recommendation of an advisory committee. The control thus exercised by the advisory committee and the bank, and the loss of control by Darlington and other contributors over funds once turned over to the Foundation do not indicate any measure of control by one corporation over another, or by or over any individual. Whatever goodwill or other benefits attach to the name Deering Milliken from use of this plan which also provides tax benefits, any consequent impression of control over contributors is erroneous.

The General Counsel has also cited a statement by Roger Milliken on tober 2, 1956, which was received in evidence at the original hearing on the issue of Darlington's business prospects. That statement, posted at Darlington and some of the other Deering Milliken mills, was as follows:

> The Administration in Washington has not yet worked out the details of a positive or permanent solution to the problem of low cost Japanese imports competition. But in a speech last weekend, Sherman Adams, speaking for the Administration, promised that they were committed to work out a solution of this problem that would be satisfactory to the American textile industry, and would stop the liquidation of American jobs and American mills that has been taking place.
>
> Relying on this promise, without which a wage increase would be impossible, we hereby announce an upward revision of wages, effective Oct. 8.

The statement is material here as it may indicate a common wage policy among the mills and control of such policy.

On the other hand, if a quondam leading government official's remarks prompted action in Deering Milliken and non-Deering Milliken mills, announcement of such action by the president of various mill corporations here no more proves that such corporations occupy a single employer status either among themselves or with their factor and sales agent than that they occupy such status with other corporations in the industry which announced similar action; no more than, where there is an industry-wide association, does such an announcement by the association indicate a single employer status among its members. Neither would the fact that the action in putting increases into effect, as distinguished from the announcement, was simultaneous and similar (if the increases were simultaneous and similar) indicate single employer status or control. The increase, not the announcement, was the salient fact; and that was determined throughout the industry by a long existing demand for higher wages and the prospects raised by the government official's remarks (and other general as well as specific factors). It is argued that an outstanding aspect of a common wage or labor relations policy among the mills (this must exclude Deering Milliken, DMSC, and DMRC) is the fact that the employees are not unionized; but this proves too much since it typifies many other cotton mills.

Close operation among the various Deering Milliken mills is further exemplified by a memorandum entitled "Cotton Spindle Activity," from Flanagan to the various mills in March 1956. This referred to a chart showing such activity for Deering Milliken mills and throughout the industry from 1941 through 1954, and then through 1955. Prepared by Deering Milliken, it was regarded as a selling argument to stimulate future activity and to boost sales. Were claims of successful operation and multiplied sales to be regarded as evidence of single employer status, the Board would have to modify its findings and its orders in countless cases. (See *infra.*)

Also cited as indicative of single employer status is a "unanimous" decision reached at a weekly meeting of Deering Milliken salesmen on June 9, 1955, and before the mills were consulted, not to confine a given blend to one customer. This decision was evidently deemed by all who considered the matter to be in the best interest of Deering Milliken and, presumably for the same reason, of the mill. Certainly it is not claimed that the salesmen controlled the mills; yet the language here is that they decided, Milliken agreeing. One can think of the admonition against "all eggs in one basket" and of the desire to maintain goodwill with all accounts. The salesman's interest would thus generally follow that of the manufacturer. That interests coincide does not prove single employer status. The action taken does not show such control by one corporation over the other as to indicate single employer status: such a decision by Deering Milliken and its sales force might well be made with the corporations occupying a multiple employer status and even if there were no common stock ownership. Nor would a sales organization's decision made without consulting its manufacturer and even contrary to the latter's interest prove single employer status. Should we then hold that, because the interests are parallel and the decision favors both, single employer status is indicated? Sales and style information is suggestive not of domination or control but of an advisory service to protect advanced funds and to further sales. Such fund advancement is characteristic of independent factors who, even if there has been no Board determination of the issue, can by no stretch of the imagination or the law properly be held to constitute a single employer with their clients.

As for the statement, in another weekly resume of a sales meeting, "We would like to make a decision as to whether we will put looms on (one or a second construction) sometime today. Please everyone contact all your customers who might have interest in this number"—to cite this is to grasp

at straws. The reference immediately before was to the "situation at Darlington" and some inquiries concerning a given construction, on which Sales Supervisor Miller had "obtained prices from Mr. Oeland." It is understandable that Miller, to his salesmen, would identify himself with Darlington in the decision to put looms on certain constructions after the salesmen reported on sales possibilities. But as Oeland set the price on the basis of various factors including market information from the sales force, so did he make the decision whether to manufacture various constructions. To conclude that these decisions were Deering Milliken's or those of its sales force would be to distort the evidence.

In December 1954 DMSC had suggested a program for customer visits to the mills. This suggestion appears to have been followed up in January 1955, when Dillard, who was at that time vice president in charge of certain sales and who was succeeded by May, notified Oeland of a plan to set up a room at Monarch mills to display finished and greige goods from various Deering Milliken mills. Monarch apparently did display some samples from some other mills. This seemingly close relationship between the mills was explained by an item in the memorandum suggesting the program, which called for an "offer of liaison" between Deering Milliken as selling organization and the various customer staff departments "to improve competitive position of both." The impulse to jump to the conclusion that Monarch was pushing sales of the other mills as in a single employer situation is thus replaced by the realization that Deering Milliken and the various mills including Monarch believed that there was an advantage to all in advertising the idea that "you can get th m all at Milliken," noted *infra*. The testimony concerning display of samples at Monarch is sketchy, and it does not appear that Monarch showed any other mill's construction which was competitive with its own. The evidence throughout shows that any all-for-one

concept was limited to what was favorable to the one; and that is a far cry from all *in* one.

It was explained that assistance in development of new fabrics is a sales function. This might be called a "Western Electric" type function, of which more *infra.* (We have already noted that there was competition among the mills in the manufacture and sale of similar constructions.) Here is another instance of mutual or concomitant benefit: as Minot Milliken voluntarily summarized when asked generally about other assistance, a very close relationship exists between mill treasurers and Deering Milliken sales departments, there being an almost constant and daily flow of information back and forth in the interest of further sales. But the nature of this relationship is clear: Although May, Deering Milliken's vice president in charge of these sales pressed Oeland to accept orders so that sales could be made, the latter considered the aspect of profits for Darlington's stockholders, with the result that offers were sometimes turned down and sales "lost." Here, as in decisions to limit operations, Oeland's authority was clear.

A Market Summary from Miller, as sales supervisor, to Oeland in April 1956 is pointed to as indicating control of Darlington's output by the other mills or by Deering Milliken. The report reads in part as follows:

> We understand that this is a very good running number at the mill and that you would be glad to have additional business on the cloth. If we can arrange to get clearance from Department 2 and operate in a sensible way in relation to the other pocketing twills being made by the other mills, we will press for additional business.

Miller testified in explanation that "clearance" was a poor word; what he wanted from Department 2, which handled heavy goods, was market information concerning pocketing twills; such twills, used in great volume, are normally heavy

but Darlington had been able to make and obtain an order for a lighter twill; Miller now wanted market information concerning the traditional pocketing twills as he sought to avoid pushing a poorer quality and developing what might be a short-lived business. As thus explained, Darlington's sales were not limited by consideration of the effect on other mills or of other elements entraneous to Darlington's own welfare. This explanation is suspect if only because "clearance" suggests authority or control. Yet, with an order already accepted by Darlington, action had been taken without actual clearance.[29] As for the procedure in actually closing orders, price lists on the various constructions are periodically given to the salesmen as a guide. A salesman can quote a tentative price to a customer, who then makes a firm bid which is ultimately referred to the mill for acceptance. The General Counsel understandably emphasizes this exhibit in his brief. But he proceeds to stress the "numerous evidences of cooperation" between the mills, which is quite different from the necessary element of control.

Further on the question of terminology and the employment of right or wrong words, use of "we" by Milliken in memorandums to various mill treasurers is cited as indicating single or joint control. (Whether the control thus allegedly indicated is claimed to be by Milliken, Deering Milliken, or both is not always clear.) Whether this be regarded as another incorrect term or whatever the explanation, the fact is that in each case actual control lay with the mill. Thus Milliken wrote to treasurers, ". . . we are planning to install a great deal of Pneumafil equipment," as he proceeded to transmit a suggestion which a mill treasurer had made concerning such installations. Leaving for the moment the aspect of cooperation in engineering, it is

[29] Cf. *Sweet Home Veneer, Inc.*, 124 NLRB No. 17, where it was held that "propaganda" referred to by the employer did not mean union propaganda.

clear that the "we" is not Milliken or Deering Milliken in an overall plan for the installation at all mills; the decision in each case rested with the mill. It was only the planning which had elements of joint effort and cooperation, and in that sense it was quite correct to speak in the first person plural.

A similar first impression of control, which analysis proves to be only cooperation appears in the very next exhibit received, a memorandum to some mill treasurers which refers to capital expenditures for other equipment, asks for a study and report by the treasurers, and states, ". . . we will review the situation for the whole organization" in the hope of obtaining a more advantageous price with some equipment supplier. The term "review" may suggest control and single entity; and this is bolstered by "we" and "the whole organization." But all that we have here is a proposal for joint or simultaneous purchase after separate authorization by each mill. As for attaching significance to the word "organization," what shall we say when reference is made to the plural, "organizations"?

One admittedly independent company, Liberty Mutual Insurance Company, cooperates to the extent that it is called upon and can cooperate with Deering Milliken and these mills. But this does not bring that company within a single employer status with the others. It cannot be denied that the various corporations referred to in the remand order cooperate with one another to a great extent. But no more in their production and attempts to improve it than in their sales do I find that joint or superimposed control which is necessary to a conclusion that they occupy single employer status. To borrow terms used by counsel for the Union, interrelationship is shown, but not interdependence, and certainly not control.

Not clearly explained are certain references to Accident Prevention Procedure. A book so entitled was prepared

by the insurer, and certain procedures therein were stamped as approved by Lowry on behalf of "Deering, Milliken and Company Industrial Engineering Department." Such a stamp in use before DMSC was formed in 1951 does not show that any different services were rendered to the mills at that time or that the relationship among them and Deering Milliken was different from that under DMSC. Insofar as Lowry's efforts since 1951 are concerned, we have here only another example of assistance by DMSC to the mills, which pooled their accident insurance to obtain just such assistance and lower premiums while at the same time trying to lower their accident rates. Use after 1951, of the stamp described has not been explained. But, it is clear from the testimony that Deering Milliken does not have an industrial engineering department; DMSC does. Despite the rubber stamp, approval had apparently been given by Lowry on behalf of DMSC or DMSCIED. (Even after this was pointed out and while a witness referred to "the Industrial Engineering Department of the Service Corporation," the General Counsel and the Trial Examiner quite unintentionally continued to speak of DMIED." Complete forgiveness will surely be vouchsafed if it be pointed out that the witness, in a memorandum headed "Deering Milliken Service Corporation Placement Department," which department was part of that corporation's IED, himself referred to DMIED!) Nor are the facts altered by Oeland's reference to "DMIED" in a letter to Roger Milliken, as in one to Stallworth, both already noted.

These are not the only instances of reference to DMIED. But before we lose ourselves in a tangential flight or spacial orbit, it should be noted that, whether DMIED or DMSCIED, no control over the mills is here shown. Whatever the title mistakenly used and the form, the advisory nature of Lowry's efforts was made very clear as he testified that he was only slowly and partially suc-

cessful in persuading the mills to install an engineered standard cost system. His assistance was available to Darlington and other mills as and when they desired and developed a cost engineered system tailored to their respective organization and operations; and when mills so desired, they retained other industrial engineers as consultants.

As for the mills' pooling of their insurance, reliance on Deering Milliken's insurance administrator and joinder to obtain favorable fire, accident, workmen's compensation, or other insurance rates does not even remotely suggest the elements of control which indicate single employer status. (Our brief consideration of Accident Prevention Procedure suggests advantage to the insurer, which favors such joinder.) Neither does joint treatment by the insurer indicate such status any more than separate treatment by tax authorities indicates separate status. The advantages in an overall policy apparently do not extend to group life and hospitalization insurance, and benefits under different policies have varied from mill to mill.[30] One may wonder about the element of free service or benefits rendered Darlington by Deering Milliken in an inclusive air insurance policy; also about the fact that the mills are not charged for the services of the insurance department, which consists of the insurance administrator and a clerk. (Fire insurance has covered churches and community houses in some towns!) But while provision of advantages may lead to control, the latter must be shown. Finally in this connection it may be noted that the only insurance policies which touched Darlington's hourly paid employees were workmen's compensation and group life; and while a master policy covered all of the mills with respect to the former, Deering, Milli-

[30]It was testified that each mill decides which benefits it wants under these insurance policies. As for plate glass insurance, only a few mills carry this, and these policies vary from year to year. Boiler insurance and factory insurance have also been rejected.

ken was not named in either the one or the other. It has its own workmen's compensation and group life coverage. It is not quite correct to say that, when Darlington was liquidated there was an amount on hand, in excess of the cost of the insurance program and that it was decided to leave it in the experience fund for the benefit of all of the other mills. The record shows only that Oeland declared finally that, since the amount remaining in the reserve fund was less than the cost to Darlington to administer the policy, it should be kept in the Darlington account.

At this point, if at all, should be mentioned an old form now used as a scratch pad and employed by "Deering Milliken Mills Textile Machinery Department" before DMSC was formed in 1951. While common use of the name Deering, Milliken Mills does not prove status, the situation is different where it is formally employed on stationery. But in the absence of proof of the circumstances when the form was in use prior to 1951, of the functions and status of the Textile Machinery Department, and of the nature of any connection among the various companies with respect to that department at that time, there is no warrant for making a finding of single employer status among these companies.

In a memorandum to May, who was at that time in charge of print cloth sales for Deering Milliken, Roger Milliken used the terms "our mills," "the whole company," "the manufacturing of Deering Milliken." If it be urged that we do not credit Milliken's testimony that he noted with chagrin his own use of such phrases, and his statement that he used such terms incorrectly there and elsewhere, we are still left with what would at most be an admission that there is a close, even single employer, status. Such an admission would be evidentiary, to be weighed with the other evidence. Milliken is not qualified to determine the legal

significance of such language; but I credit his testimony, and find that it was not his intention, as he employed those terms, to ignore or to set aside the relationships which actually existed as the evidence here shows.

With respect to the substance and purpose of this memorandum, a factor's interests as well as its manufacturers' are furthered as the sales staff is informed and itself "sold" on improvements in the mills' procedures. Milliken wanted May's assistance in obtaining recognition in the market of some of the mills' goods as premium by virtue of the improvements which they had effected.

As for a few other items in the record, use of an old form ("Deering, Milliken Mills Purchasing Department") in one case of 35 to 50 noted instead of the current form ("Deering Milliken Service Corporation"); use by an employee of the ambiguous word "transfer" where the evidence indicates that a sale was made from one mill corporation to another;[31] use of a form which calls for approval in "New York" when such approval was noted in New York only by Milliken as president of a given mill when he had been in New York and before he moved to Greenville: these do not prove the single employer status which the General Counsel and the Union claim. Here again we must remember that, in weighing the evidence which may suggest single employer status, effect must be given to both the quality and the quantity of such evidence; and the quantity must be evaluated in relation to the thousands of documents examined by the General Counsel and the many months spent in his unhindered search for evidence.

Whether and to what extent Darlington's former customers have since its cessation of operations purchased through Deering Milliken and from other Deering Milliken

[31] Although we have considered the significance of the use of such words as possibly indicative of an existing relationship, we must not "make a man an offender for a word." Isa. 29:22.

mills we do not know. There is no evidence[32] of a pattern of sales to them by Darlington which, after its liquidation, was continued by other Deering Milliken mills, as we shall now see. Nor does it appear that there was a transfer of accounts, of constructions manufactured, or of styles to another mill when Darlington was liquidated. Yet such transfer and assumption of Darlington's functions would naturally and almost automatically occur were this a single employer situation. As for the few orders which Darlington was unable to fill because of the liquidation, it is clear that some were sold to other Deering Milliken mills, some to non-Deering Milliken mills. In fact, the first testimony concerning this was to the effect that an order was transferred to a Deering Milliken mill only after an attempt to transfer it elsewhere had failed. The several orders were taken over by various mills as if purchased in the open market: Darlington kept a premium or bonus if an order was now advantageous as the result of market fluctuation; it paid for the assumption of the obligation by another mill if the order price now seemed to be insufficient or if a change in construction would result in higher cost. (What conclusion could be drawn and what would the General Counsel's argument be had these orders been transferred without a differential, Darlington or the acquiring mill assuming the entire gain or loss as in an out-of-one-pocket-into-the-other situation.) One contract was cancelled with an allowance to the customer. There is no basis for concluding that the transfers favored other Deering Milliken mills or that they indicated an element of control over Darlington or the other corporations which, for example, might have permitted dictation or insistence in connection with the

[32]It might be advisable to omit the details about to be set forth in this connection, and to proceed at once to the conclusion which appears a few pages later. But the evidence is involved, and analysis may be especially helpful here.

taking over of the orders. As for Deering Milliken, its concern with these orders was that of the sales agent which had secured them and was obliged legally or morally to see that they were fulfilled.

To the extent that the Board is interested in the Union's offer to prove that Deering Milliken "has suffered no depletion in the type and amount of products available for sale by it," this was not shown at the remand hearing; the sale of orders to non-Deering Milliken mills suggests the contrary, and there is no proof that Darlington's products in their type *or* amount, were compensated for and provided in addition to what would otherwise have been the other Deering Milliken mills' production. As the offer of proof was thus discussed and the evidence submitted, the General Counsel could only state that he hoped to show that Darlington's constructions were made at the other mills when the former was liquidated or were begun by them shortly afterwards. The latter alternative might be construed to support the offer of proof although, even had that been shown, it might reflect any competitors' attempt to fill a void. The other alternative, that Darlington's constructions had been and were being made by other Deering Milliken mills, still calls for proof that Deering Milliken "suffered no depletion in the type and amount of products available for sale by it."

If a Deering Milliken salesman found that a customer wanted a given construction which was not being made by any of his manufacturers, it was Deering Milliken's function to try to persuade one of them to make it. The testimony that Deering Milliken persuaded Monarch to make a construction which Darlington had formerly made but which had "lapsed into inactivity" before the liquidation shows only that Deering Milliken suffered no depletion so far as that order was concerned. Why Darlington had discontinued the construction, we do not know; nor whether

Darlington would have returned to it and filled this order. Neither is it shown whether or to what extent this construction replaced another on Monarch's looms. Certainly production by one mill of a fabric which had sometime earlier been made by another does not prove single employer status.

With respect to another construction, the testimony shows that, with liquidation impending, Darlington could not guarantee delivery and an order was therefore placed with Monarch. But proof of the issue of depletion is not to be found in evidence that some constructions were picked up by other Deering Milliken mills and thus not lost to Deering Milliken (here again is the problem of the universal negative); on the other hand, any loss is probative, and we have evidence of loss to outside mills. In like vein, a construction which Darlington alone of the Deering Milliken mills made in 1956 was not thereafter picked up by any of the others. As for the styles encompassed in 13 percent of Darlington's 1956 production, the testimony is that no records are available to show whether those styles were thereafter manufactured by any Deering Milliken mills.

The attempt to show that other Deering Milliken mills succeeded to Darlington's business in fact would have proved too much. Thus with respect to some of Darlington's constructions it was shown that Monarch and others had not made more in 1956, and had made and sold others of them generally in larger amounts than Darlington had; but that after 1956 they made and sold them in quantities several, even many, times larger than Darlington's sales had been, with an increase in the amount sold over their own sales in 1956. With respect to one of these, before Monarch was persuaded to make this construction, Deering Milliken as sales agent lost sales, the customer purchasing it elsewhere. Thereafter Monarch's sales to this customer on this construction were increased greatly over Darlington's

in 1956. As counsel for the Respondents suggested, a single employer entity with overall control could be expected to have effected a transfer of production to other mills in the entity without interim loss to outside mills. (Of the styles included in two contracts sold by Darlington to Monarch, Darlington's production in 1956 was less than 3 percent of Monarch's in that range. It is difficult to find here evidence that Monarch succeeded to Darlington's business when it is noted that Monarch's 1957 production in that range was only 60 percent of that in 1956.) But the reference to increased sales in 1957 suggests an unwarranted claim that Darlington's sales would have continued and been thus greatly expanded had it not been liquidated. If the argument be only that Darlington would have continued with some sales and that these fell to other Deering Milliken mills, the answer is that we do not know general market conditions with respect to various styles; whether total sales of given constructions remained constant, with other Deering Milliken mills taking over Darlington's; how many of Darlington's customers bought elsewhere when "everybody move(d) in,"; the extent to which some styles lost in popularity while others gained, etc. The same kind of general and inconclusive proof was presented by the Respondents' evidence that, considering all of the Deering Milliken mills except Darlington, the increase in production of carded cotton fabrics in 1957 and 1956 was at approximately the same relative rate as the increase in 1956 over 1955, and that such increases were due primarily to new equipment; there was no increase in 1957 which could be attributed to succession to Darlington's business. I would no more base on this testimony a finding that the increase over 1956 shows that other Deering Milliken mills did not succeed to Darlington's business (actually their 1957 production was less than that for 1956 including Darlington's; other figures show a drop-off in cotton yarn spindles produced at other

mills in 1957) than I would find the contrary on the basis of the facts brought out by the General Counsel. Too many other factors and conditions exist as a bar to definitive findings on the limited evidence in this connection. We can only guess at what caused lesser production at other mills in 1957, and whether their production would have been still smaller had not Darlington been liquidated. But that Deering Milliken suffered no depletion in the products available to it for sale or that Darlington's business was transferred to other Deering Milliken mills (which mills?) has not been shown.

Similarly, what conclusion can be drawn from the fact that, of Darlington's 10 best customers, 7 in 1957 decreased by 17,000,000 yards their purchases from Deering Milliken mills of constructions "generally competitive" with those which Darlington had made, while 3 increased their purchases by some 8,000,000 yards?—or from the fact that, of the 8 customers who had unfinished contracts with Darlington at the time of liquidation, some of which contracts as we have seen were transferred or sold to other Deering Milliken mills, 6 including the 3 largest purchased less from Deering Milliken mills in 1957 than from Darlington in 1956? (As the General Counsel pointed out, "overall" figures do not have validity without details of the underlying circumstances.) Again it must be said, whatever might be deduced from this, that the evidence does not show single employer status or that the Deering Milliken mills "picked up the complete or anywhere nearly the complete business of" Darlington. Nor can we base any conclusion on the "general pattern" of the market and its unknown effect on the sales here; also unknown is the extent to which sales to the various mills could be compared because a general pattern was considered.

It was further testified that orders placed with Monarch after early September 1956 for one of Darlington's

constructions represented an attempt by Deering Milliken to retain Darlington's business. Such an attempt would be made by a sales agent regardless of single employer status.[33] Monarch's production of this item in 1956 was two and one-half times as great as Darlington's; it increased slightly in 1957. Whether this item standing alone would show that Deering Milliken suffered no depletion, the other evidence on this point cannot be ignored.

Whatever the problems connected with an attempt to earmark sales and to trace those of one period to those by another corporation at another time, the argument here is only of the nature of *post hoc ergo propter hoc;* new constructions or increases in old ones (ignoring decreases) are not *ipso facto* to be accepted as proof of transfer or succession without regard to the many undeveloped factors which determine styles manufactured and the amount of sales. We recall that the evidence in the original hearing showed the variety of Darlington's constructions through the years and the fluctuations in sales, these without any issue of succession to or transfer of customers or their orders.

Not only has it not been shown that in 1957 the other Deering Milliken mills added to their 1956 production the amount of Darlington's last annual production, but it appears that total spindle activity in the Deering Milliken mills was less in 1957 than it had been in 1956; and while there was a drop in 1957 in total spindle activity of all mills in the industry, the drop percentagewise was greater among the Deering Milliken mills. We have already noted the failure to support the offer of proof (that Deering Milliken suffered no depletion) with an attempt to show transfer

[33] Even a showing of "no depletion," as claimed, would not prove single employer status. It would be necessary to find that control (or single employer status, first shown!) prevented depletion, rather than the competitive activity and successful "moving in" of other Deering Milliken mills.

of or succession to its business. We now see that, contrary to the proffer, there was in fact a depletion.

Were it shown that other Deering Milliken mills made sales which but for its liquidation Darlington would have made, it is nevertheless clear that they did not succeed to other Darlington business. This is a picture of competition in a free market as "everybody moves in"; not of Deering Milliken control and transfer of Darlington's business to related mills. As was pointed out at the hearing, whether these were independent or integrated corporations, there would be absorption of Darlington's constructions after it was liquidated. Acquisition of some of Darlington's customers and their business, even if shown to be such, is consonant both with single employer status and with independence, and proves neither.

Aside from the issue whether the detailed testimony concerning the manufacture of certain constructions by Darlington and other mills shows any increase in constructions formerly made by Darlington which could be traced to the liquidation, several pertinent questions call for answer. Would single employer status be extended to a non-Deering Milliken mill which obtained a Darlington customer and sold to it constructions which Darlington had made? To the extent that a Deering Milliken mill obtained such business, did any non-Deering Milliken mill manufacture the constructions and seek the account? As for Deering Milliken's role in selling for mills other than Darlington, would not an admittedly independent agent, losing one manufacturer, seek to retain its customers' business by obtaining the constructions from another of its manufacturers? The General Counsel is quite correct in declaring: "Deering Milliken, in its capacity as sales agent, has a definite interest in attracting and holding established customers. In offering as wide a selection as possible, the sales agents' opportunities for sales is enhanced and pos-

sibilities for new sales are created." But it does not follow that the "absorption of Darlington's business by the other D-M mills helps to establish the single employer status." With publication of the news that Darlington was no longer accepting orders, there was general competitive activity in the industry in the direction of its largest customers: generally in such situations, and here, "everybody moves in."

What the General Counsel called a substantial increase in Pacolet's and Gaffney's 1957 production of one construction but was actually relatively small brought the total of their 1957 production of that item to little more than half of Monarch's in 1955; Monarch did not make any in 1956. The argument of transfer or succession to orders based on increased production would lead to the conclusion that Darlington, Pacolet, and Gaffney succeeded (but with limited success) to Monarch's business. The same argument addressed to fluctuations throughout the industry would "prove" similar transfer of orders and presumably single employer status of all mills in the industry. Only if we assume single employer status and general transferability of orders can we conclude that the fluctuation of business in each mill from year to year reflected in large measure transfer of orders from one to another among the Deering Milliken mills or in the industry as a whole.

The General Counsel appeared to try a different tack when, after examination concerning types of construction and overall spindle activity, he inquired concerning yarn variations. Here it was brought out that Monarch did not in 1956 run warp yarn which could produce fabrics similar[34] to Darlington's but that it did make such yarn and six other types in 1957. But this does not indicate succession to Darlington's business since in 1955 Monarch had likewise pro-

[34] At this point we recall testimony that Monarch did in 1956 produce constructions or styles similar to some of Darlington's that year, and in larger quantity.

duced such yarn with five additional types. Monarch's production of this one type did not depend on Darlington's absence, and it has not been shown to have stemmed from succession to the latter's customers and business.

It was recognized[35] throughout the first hearing that Darlington's operations were terminated, as we have already noted. Not only have machinery and equipment here been sold,[36] but they were disposed of piecemeal,[37] and there is no question concerning relationship between the closed company and a new operator of its plant and equipment.[38] The relationship between Deering Milliken and Darlington is not that of companies making the same product; nor has it been shown that the other manufacturing corporations in the chain have occupied such a status vis-a-vis Darlington as to make applicable the reference in the *Mount Hope* case[39] to an attempt "to take refuge behind the corporate entities." That the other Deering Milliken mills did not succeed to Darlington's equipment orders, and that they did not become liable for the violation or any remedy herein was evidently recognized by the General Counsel and the Union

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[35]The argument for backpay is based on this very recognition of the cessation of operations as violative of the Act. Similarly, the General Counsel's and the Union's emphasis in their briefs to the Trial Examiner after the original hearing was on Darlington's "liquidation," and no claim was made that its operations had in fact been continued elsewhere.

[36]See *New Madrid Manufacturing Company*, 104 NLRB 117.

[37]The offer of proof which the Board cited in its remand order alleged that a "large portion of the machinery and equipment was sold at a substantial loss, pursuant to Deering, Milliken & Company's plant, to its other plants in the area which produced the same broadcloth and print cloth as produced by Darlington." But no evidence, as might warrant piercing the corporate veil, was offered to show that the best prices were not obtained or that, whether or not pursuant to a plan (and whatever the extent of purchases by Deering Milliken mills), any of the other Deering Milliken mills were favored in the sale of Darlington's machinery and equipment.

[38]Cf. *Drennon Food Products Co.*, 122 NLRB No. 163.

[39]*Mount Hope Finishing Company*, 106 NLRB 480, 499.

when, although the question of remedy was then clearly before us, they sought no more at that time than a declaration that Darlington should resume operations; there was no claim that other mills had succeeded to Darlington's business and that, because of some relationship with Darlington, they should be directed to remedy the violations found.

Such evidence as is here noted and similar proof was received with respect to one department after another at Deering Milliken, DMSC, and DMRC, and one activity after another by and at those corporations and the various mill corporations. We could describe many more series of letters and memoranda which show only suggestions to the mills and decisions by the mill treasurer. In numerous instances, after many documents were discussed and received, it became quickly evident at the hearing that we had been laboring over items which do not indicate single employer status. It would serve no useful purpose to extend our analysis and specific findings. What has been noted is typical, and what has been said is generally applicable.

Were this case less complex, with fewer and no more probative items of proof, it would be necessary only to point out that, despite the extent of common ownership by members of a family group (rather than by given individuals), these corporations are operated as separate entities from separate offices in different cities or towns; and that Darlington alone was involved in the activities which led to these proceedings. Interrelationship is clear, but not control or single employer status.

We have received evidence of many lawful cooperative acts to attain lawful objectives. Whether the nature and extent of this cooperation are such as to warrant a finding of control, particularly control of labor relations, is some-

thing else. The evidence before us does not show control of the labor relations or policies of one corporation by another. *A fortiori* they do not show single employer status.

I have found that Darlington violated the Act in its reaction to the results of the election of September 6, 1956; Milliken, as its president, took the lead in such violation. But it does not appear that Deering Milliken determined that violation or had any responsible connection with it. Neither the functions nor the activities of these two corporate entities met at that point. We have only the claim that, since the president of one corporation was active in or dictated its decision, and since he was also president of the other corporation, the latter (as well as the president individually) is legally connected with and responsible for the other's decision.

No more are the other corporations of which Milliken is president connected with the violation here found. Certainly there is no *per se* carry over of any relation between Darlington and Deering Milliken, DMSC, or DMRC so that it can be found to exist between Darlington and the other mills. As for the attempt to show that labor relations at other mills were somehow connected with those at Darlington, we can summarize by noting that counsel's efforts were brave but the result was puny. The proof concerning labor relations at the mills, including evidence of independence in connection with vacation plans, transfer of employees, recruitment, retirement, and other items, indicates that labor relations, even when parallel, were independently determined.

It will be recalled that the evidence at the earlier hearing indicated that ingenuity and improvements in methods characterized Darlington's management and its operations; and that these were recognized in the finding of violation. Accepting this, the General Counsel and the Union now in effect would force strict limitation on outside, i. e., other

than Darlington, research and other services which make that ingenuity possible; such outside services are now cited as proof of single employer status. But such limitation would seriously impinge on the ingenuity noted.

What of admittedly independent textile institutes and others, such as tax attorneys and insurance companies, which provide assistance? Are these to be included in the single employer entity? What if a tax attorney owned stock in one of the mills? What if he were of the Milliken family and thus related to someone who owned stock in that or another of these companies? Would his advice under such circumstances make him liable for the mill's violation of our Act? The claim here raises more questions than can reasonably be answered if the General Counsel's position be sustained. (Joint efforts in the textile and other industries are considered *infra.*)

It is unnecessary to determine here by percentage or adjectives the extent to which a single entity is suggested. The question is rather whether such an entity has been proved for purposes of imposing liability or directing a remedy. As the various subjects or the aspects of the evidence have been weighed, it has been found that they do not severally indicate single employer status among these corporations. Nor are there enough of such aspects in combination to indicate that status. It can be argued that we should consider "the mass of information," a nebulous totality which the General Counsel and the Union cite without thereby abandoning any of their specific but insufficiently supported items; the whole is to be found greater than the sum of the parts available. The validity of this kind of finding, which can be denied only by general argument of the same order as that offered in support, usually cannot be disproved; neither can it be proved. Such an overall finding as is thus urged is of the nature of "Tis so; 'tisn't." It must leave the judicial mind in a quandry. But

having said that a finding of so-called totality usually cannot be disproved, we can indicate a greater measure of success here, where the missing part is the element of control.

It appears that somehow, if a point suggests a 1 percent doubt or possibility of single employer status, 100 such points are assumed to prove the case beyond all doubt, or 90 to show 90 percent certainty.—And a 20 percent doubt in four instances creates an 80 percent certainty. But this ignores the 100 instances of 99 percent on the other side, and the other contrary figures down to the last example: four instances, each pointing to or consonant with independent status. True, no attempt is made in such instances to assign percentage values. But such assignment in the examples here should serve to remind us that the argument of "a little here and a little there" overlooks the preponderant values elsewhere.

It is true, as counsel has stated, that we may not be able to "isolate one exhibit" as proof of a given point. But citation of an amorphous mass may cause one to forget that we have nothing more than a mass of trivialities when all of the operations of the various corporations and all of the evidence are considered.

More important than even the percentage or relative extent of assistance and cooperation is the fact that they were determined and limited by the decisions of the mill treasurer: they do not indicate control from without.—And, while counsel differ on the nature and extent of control shown, they do agree, by their repeated references to and stress on it, that the element of control must be found. Without control over decisions and operations, the total of instances of advice accepted (even were the number far greater than here shown) may reflect no more than the mills' opinion that their advisers are both faithful and competent.

The respective positions here may roughly be represented as claiming or tending to claim on the one hand that Darlington is independent of the other corporations in management and control and, on the other, that the various corporations, including Darlington, occupy a single employer status. To be meaningful here, any single employer status found must include Darlington. The evidence indicates that there are many aspects and instances of operation which typify independent organizations. Yet there are some instances which characterize or suggest a single entity. There is thus some basis for each of the respective positions although counsel for each side could readily enough propose changes in the operations which would strengthen their own respective claims.

The question is, in the accepted terminology, whether "sufficient integration exists"; it is thus one of degree or the extent to which the management and control of these corporations indicates one or the other type of operation, and supports one position or the other. In thus evaluating degree, opinions may well differ, and they probably will. My own, with full recognition of all of the evidence, is that these corporations do not occupy a single employer status.

It is evident that Board cases involving the issue of single employer status are quite dissimilar from the instant one; none has been cited which involves a factor, although there are cases of sales agents in a narrower scope. It may be concluded that the absence of any allegation of single employer status in cases where relationships are of the nature of those which exist here indicates the determination to be made in this case. Contrariwise, similarity must first be shown, and it may be that absence of prior allegation reflects only a less assiduous charging party; and, of course, new law may be declared here. Whether the Board will now depart from established precedent remains to be seen. I

have already indicated, by analysis of the evidence before us, that the law does not warrant a finding of single employer status on the instant facts.

Several recent cases involving the question of an ally relationship throw light on the issue before us. Conceivably such a relationship might exist between corporations to the extent that picketing would be held to be primary rather than secondary, as for instance where a struck employer becomes allied with another or with one of several plants of another employer. But that relationship can be found on less proof than is needed to include one corporation in a finding of violation against the other, or in a remedial order directed against that other.

We speak of single employer status, *alter ego,* integrated operation,[40] etc. But it does not appear that any of the other corporations here were "in active concert or participation with"[41] Darlington in the violations found; that they unlawfully reaped benefit therefrom; or that they have been in active concert or participation with Darlington in a common plan of evasion.[42] Even if less need be shown to establish an ally relationship as a defense to an allegation of unlawful secondary boycott, the following extract from the Board's decision in the *Bachman Machine Company* case[43] may cast some light here:

> Here, not only do the members of the same family own all the stock and property, and compose the boards of directors, of both employers, but the same individual is the president and active head of both, *controlling all their operations, including labor relations policy.* (emphasis supplied.)

[40] *Regal Knitwear Company* v. *N. L. R. B.*, 324 U. S. 9, 19.

[41] A highly restricted definition of this term is noted *infra*

[42] Cf. the Board's position as recited in N. L. R. B. v. Deena Artware, Inc., 261 F. 2d 503, 506-507.

[43] Warehouse and Distribution Workers Union, Local 688, Teamsters (Bachman Machine Company), 121 NLRB No. 165. See also *Dearborn Oil and Gas Corporation,* 125 NLRB No. 71, cited *supra* in footnote 15.

This Board statement of the general rule was apparently endorsed by the Court of Appeals for the Eighth Circuit, which first recited the facts in the *Bachman* case as follows:[44]

> Bachman and Plastics are two separate and distinct corporate employers; the capital stock of each is owned by one family; each has officers and boards of directors drawn from members of the family, the head of the family being the President of each company; each company is engaged in a different, separate and nonintegrated business; each is a substantial customer of the other; each operates a separate business in a separate plant, the plants being in fairly close proximity to each other, in the same city; each plant has a separate labor force represented by a different union; the employees of one plant are skilled or semi-skilled mechanics; the employees of the other are unskilled; the President of each company is its majority stockholder, concededly in the actual control and management of one company, and found by the Board to have been in actual control of the labor policies of the other company and to have participated actively in the negotiations with the Union which represented its striking employees, who extended their strike to the company which was not their employer.

The court then pointed out that in *I. G. Roy & Sons Co.* v. *N. L. R. B.*,[45] the First Circuit Court

> held that there was no evidence of mutual common control over labor policies or any other phase of the operations of the two companies, and that potential common control, because of the common ownership of stock, was not enough to justify a ruling that the two corporate employers were a single employer under Section 8(b)(4)(A). (Emphasis supplied.)

Bachman was then reversed with this statement:

> But we think the evidence fell short of establishing that both companies were under such actual com-

[44] 266 F. 2d 599, 602-603.
[45] 251 F. 2d 771 (C. A. 1).

> mon management or control as to make them allies or a single employer for the purposes of Section 8(b)(4)(A) of the Act.

The court then continued as follows:

> We fail to see why Bachman should, under the evidence, be regarded as an offending employer or why it and its employees should be embroiled in the controversy between Plastics and its employees and their Union, merely because the President of Bachman, who was also the President of Plastics, controlled or participated in the control of the labor relations of that company.

Whatever the difference in *Bachman* concerning management and control, the Board itself there relied on single control of operations, including labor relations policy. No more than would ownership alone prove single employer status does the testimony before us that Darlington and other mill stock prices were publicly quoted and traded in prove independent status. Either single employer or independent status can exist among both closed and publicly owned corporations. We are and have been more properly concerned with evidence of control.

The court's rejection of the "allied-employers" defense in *Bachman* has been accepted by the Board as the law of the case.[46] In several obvious respects, the relationship is not close between Darlington and the other corporations here. Whatever may be said concerning ownership, potential control of labor policies, and actual control of such policies, integration and actual common control over labor policies call for greater proof; single employer status goes even further, and calls for still more proof.

Plainly, the Board has asserted jurisdiction in integrated companies. But the converse is not true: where jurisdiction is taken, integration (much less, joint liability, and

[46]124 NLRB No. 98. The importance of control of labor relations is pointed out in *N. L. R. B.* v. *New Madrid Manufacturing Company*, 215 F. 2d 908 (C. A. 8), as cited by the General Counsel.

still much less, single employer status) does not necessarily exist. Joinder in a trade association will be considered for jurisdictional purposes even if liability is not imposed on each component entity. It is clear that evidence of a closer relationship is required for an allied-employers finding in secondary boycott cases.[47] When we consider the purpose and effect of a single-employer finding here, it must be evident that still more must be shown.

Clearly (in this situation I do not hesitate to use the term) no single employer status has been shown here. Whatever the finding in the *Bachman* case concerning ownership and common control, the several companies played a part during and in connection with the events considered in that case. In the instant case, there is no evidence that any of the other corporations were involved in the commission of the violations found. As for joinder in any of the benefits or results from the violations, as a moral basis for disseminating a remedy, the evidence shows only that other mills, among them some of those covered by the remand order, took over a few orders, all of them on an open market basis or, to use a phrase more apt in strict buyer-seller dealings, as *bona fide* purchasers for value.

There is no evidence or even suggestion that Deering Milliken or any of the other corporations, or all of them, had authority to resolve the labor dispute between Darlington and the Union; or that the Union, the employees, or any other group or persons had ever looked to those other companies to accomplish that. Yet such authority, which may exist where there is no single employer status, is a necessary attribute of such status. The Board, through its General Counsel, argued as follows in its brief to the Circuit Court in the *Bachman* case:[48]

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[47]Cf. *Dallas General Drivers, Warehousemen & Helpers, Local No. 745, AFL-CIO (Association Wholesale Grocery of Dallas)* 118 NLRB 1251, 1255.

[48]Following the quoted sentence, the brief continues in support of the principle noted supra that "(u)nder settled principles, two

> When two entities are thus allied through common ownership and actual common control of their labor relations policies, the same employer to whose premises the picketing has been extended is in a position to resolve the labor dispute of the struck employer and thereby end the picketing at his premises.

The authority and attribute have not been shown here; they were not claimed before Darlington violated the Act. Not only has single employer status not been shown, but authority elsewhere to resolve any labor dispute at Darlington does not appear to have been recognized, considered, or claimed until the question of remedy for violation here arose.

We have seen that no less proof of single employer status is required within contemplation of liability for violation of Section 8(a)(1) (3), and (5) and remedy for such violation than is required for a finding of ally relationship to bar a secondary boycott claim. Nor should we lose sight of the difference in applicability of remedy. Whereas in *Bachman* picketing would be banned, the possible remedy here is reinstatement and payment of lost wages. Of the various corporations, only the mill corporations could instate these employees; and the proof does not warrant that remedy. Neither does the proof warrant imposition of backpay liability, for whatever period, on any of the other corporations.

We need not here attempt an analysis of all of the cases on the subject of allied, integrated, or single employer status. We have already seen that the requirements for finding these may differ, as may the effect of such findings, from permitting limited exposure to what would otherwise be secondary picketing, to direct liability for remedying unfair labor practices. If other cases where the issue of single

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ıtities enjoying a separate corporate existence may nevertheless be regarded as one 'employer' for purposes of Section 8(a) of the Act if they are under common ownership and control and their labor policies are subject to common direction."

employer status was involved are different from this one, the language employed in some may nevertheless be helpful as indicative of underlying principle and Board attitude.[49] Of the cases cited[50] by the General Counsel or the Union, the *Allen* case[51] was based on more than stock ownership alone. This is true of the frequently cited *Somerset Classics* case[52] also, and of other cases cited by the Union, although its brief emphasizes the ownership aspect. The factual analysis herein, the findings, and the stated principals of law are submitted with full recognition of the rule as repeated in *National Shoes, Inc.*,[53] and which, quoted as follows in the Union's brief, supports the rule hereinabove recognized:

> Decisions of the Supreme Court and of the courts of appeals establish that where the operations of 2 corporations are closely integrated under common control, and particularly where this integration and control are manifest in their labor policy, the 2 corporations will be considered a single "joint employer" for the purposes of the Act.

In Industrial Fabricating, Inc., the Board found that various corporations constituted a single integrated enterprise. The following language from the Intermediate Report in that case indicates elements which are not here present:[54]

> Where the relationship of one company or individual to another presents such features as financial control over the latter through advance of operating capital

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[49]Surely comparison of the facts here with those in situations which we shall note infra where independent status is recognized is no less worthwhile than comparison with single employer cases where the facts are different.

[50]All of the cases cited have been examined. In the main, their differences and inapplicability here are readily to be noted.

[51]*A. K. Allen Co., Inc.*, 117 NLRB 568, enfd. 252 F. 2d 37, (C. A. 2).

[52]*Somerset Classics, Inc.*, 90 NLRB 1676.

[53]103 NLRB 438, at page 441.

[54]*Industrial Fabricating Inc.*, 119 NLRB 162, at page 199.

and inventory, supervision and direction by the former over the latter's production operations, and control by the former over the latter's production operations, and control by the former over the latter's labor relations policies, there is a "measure of domination . . . . (which is) inconsistent with the notion that (the latter is) . . . a free agent either in handling the enterprise or in dealing with the men employed." (Citations omitted.)

As review of the facts in *Industrial Fabricating* discloses the elements there present, the control and the interchange of assets, similar enlightenment can be found in the *A. M. Andrews, California Footwear,* and *Dayton Coal and Iron* cases.[55] In *Andrews* the Board found that "the Respondents form(ed) a multi-state enterprise. . . ." The Trial Examiner's finding there "that the Respondents (were) separate employers . . . (and therefore were not to) be held responsible for remedying the unfair labor practices" was reversed, the Board finding that "the Respondents constitute(d) a single employer within the meaning of the act"; and that one Respondent was "an integral part of a multi-state organization, and . . . (that the other Respondent was) responsible for remedying the unfair labor practices (t)herein found . . . ." The Board there cited and relied on "factors of paramount significance" which indicated single employer status but which are not here present. It might be argued on the basis of the *Andrews* decision alone, although the Board there reserved this question, that remedy could alone, although the Board there reserved this question, that remedy would be withheld against one of several respondents which was not connected with the violations, even where the operation is integrated. This is in harmony with that is suggested *infra* concerning need for a joint labor policy.

[55] *A. M. Andrews Company of Oregon,* 112 NLRB 626; *California Footwear Company,* 114 NLRB 765; *Dayton Coal and Iron Corp.* 101 NLRB 672.

Supplemental Intermediate Report (1959)

The Board's decision in *Industrial Fabricating* issued 6 months after the first Intermediate Report in the instant case. That decision is of further interest for, after finding violation of Section 8(a)(5),(3) and (1), and joint and several liabilty where there was a "transfer of operations," the Board significantly added:

> This is not the case of an employer who decides to go out of business rather than deal with his employees' statutory representative.

But the finding of violation in the instant case stemmed from the employer's decision, as pointed out in the Intermediate Report of April 1957, to do what was not done in Industrial Fabricating: to go out of business rather than deal with the Union. This was declared to be violative despite the protests of counsel for Darlington. In considering the question of remedy in that first Report, I relied on this very distinction between transferring a business and going out of business.

As for any further concern over so-called social consequences or the question whether an employer would be enabled to violate the Act with impunity, it may not be amiss to refer at this point to the second Intermediate Report in this proceeding, issued on April 30, 1959, in which it was recommended that the complaint against Roger Milliken be dismissed. It was there pointed out that Darlington had gone out of business, and that going out of business is a self-limiting and not a common situation; whatever is sought to be prevented, it does not constitute a benefit to the employer. Here is an important distinction between a runaway plant situation and single employer status on the one hand, and a going out of business: the transfer and accrual of business and benefit which characterize the former are absent in the latter.

Supplemental Intermediate Report (1959)

In the first Intermediate Report, while making my recommendation with respect to remedy, I explained generally why the various proposals for backpay could not be supported. There has since been some apparently special attention, as noted at this resumed hearing, to backpay from the termination of the respective employees' employment until the date when the plant actually closed or until the date of completion of the contracts of sale entered into at the auction of plant properties. Because of the attention given that proposal, I would add the following to what was said in this connection in the Report of April 30, 1957:

> Award of backpay to the date of closing of the plant or the date of sale suggests that, had the gates been closed and assets sold immediately after the decision to take such action, no backpay would be allowed. But the testimony is to the effect that the gates, figuratively speaking, had to be closed successively and over a period of weeks instead of all at once. To assume that employees would have continued on their jobs until the date when the plant was closed or sold, and to pay them for such period is to assume that Darlington did not actually terminate operations in what the record discloses was the proper manner. Nor is there any indicated basis for preferring by greater backpay those employees whose departments could earlier be closed over those who were employed for a longer time; presumably in any beginning or resumption of operations, past or future, the former would be employed, and paid, earlier than the latter. It should be unnecessary to point out that there has been no claim of discrimination against individuals as such, as by termination prior to the progressive closing of their departments; the discrimination alleged and found lay in the decision to liquidate and the progressive liquidation which followed. The fact that Darlington's various departments were thus shut down seriatim may, as argued by the Respondents, have a bearing on

the issue of single employer status, under which it would have been simpler to have closed down at once, transferring to related mills the work in process.)

When, in the Intermediate Report of April 1957, I pointed out that backpay could not be awarded because one could not say how long Darlington would have continued in operation but for the violation found, I sought to and did avoid emphasis on the concept of directing an employer to go back into business; and reference to the Circuit Court's decision in the *New Madrid* case, *supra*. (*New Madrid* was considered at that time only in connection with the issue of liability, not of remedy.) But there has since been reference to this principle without Board disapproval, and it appears that the Board would not now direct such a return. One can, therefore, with perhaps better logic and greater support, note that if Darlington is not to be ordered to resume its business, there is no basis for asserting a partial direction to resume by ordering back pay for any period after the respective departments were closed and employees terminated.[56]

Since the Board will consider the Intermediate Report of April 1957 in connection with this Supplemental Report, it may be helpful at this time to refer to another remand order, which the Board issued in the *Barbers Iron Foundry* case.[57] The Board did not there subscribe to the Trial Examiners's opinion that "until final liquidation, the closing, no matter of what duration, must be presumed to be temporary"; and, presumably because it deemed the question significant, it directed that evidence be taken to determine whether the closing was a temporary shutdown or a permanent discontinuance of business operations.

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[56] See footnote 13, *supra*.

[57] January 12, 1959, Case No. 4-CA-1649.

In *Indegro, Inc.*,[58] the Board held that individual owners do not constitute a single employer although members of an incorporated association to purchase, sell, and advertise. On the other hand, such recent cases as *General Engineering, Inc.*,[59] in which the Board found a single employer status, are readily distinguishable on their facts. Nor do such cases as *Venus Die Engineering Co.*,[60] *Metco Plating Co.*,[61] *Roanoke Railway*,[62] and *Boulder Transportation Co.*,[63] to cite a few others, point to any basis for finding single employer status here. More important than ownership is the extent of common control over operations and policies.[64]

The evidence of common ownership and control and of common direction of labor policies is clearly different in the instant case from that note in those cases in which single employer status has been found. There is no evidence that labor policy at Darlington was controlled by any other company, or that there was a labor policy at Darlington and other companies which was controlled by Roger Milliken or any other individual. Darlington's labor policy was directed by its treasurer, Oeland, subject to supervision by the board of directors and ultimately the stockholders. Where Milliken could intervene, it was through his status as stockholder, director, and officer of Darlington, not because of his position or interest in another corporation.[65] In the absence of

[58] 117 NLRB 386.
[59] 123 NLRB No. 85.
[60] 110 NLRB 336.
[61] 110 NLRB 615.
[62] 117 NLRB 1775.
[63] 120 NLRB 1783.
[64] *N. L. R. B.* v. *Condenser Corporation of America, Inc.*, 128 F. 2d 67, 71 (C. A. 3).
[65] Were we to go beyond the record and take notice of conditions in southern textile mills generally and the problems connected with attempts to organize them, even as referred to at these hearings, we probably would conclude that the policies followed here reflected those at many other and diversely owned mills in the South. It has not been claimed that community of policy among all mills in the area creates a single employer status among them.

joint policy or operation, ownership or officership in several corporations by one person is not the same in significance as control of one of the corporations by another or the single employer status of all.

Here further distinction might be made between control by one individual or company (if that were shown) of the labor policies of different companies, and a common labor policy controlled at one focal point. While a Board brief may refer to "labor policies subject to common direction," such language must be construed as meaning *common labor policy* or labor policy *jointly* applied.[66] Else there would be widespread and apparently unintended piercing of the corporate veil among all commonly owned companies otherwise wholly unrelated except in their *source of advice* with respect to labor policy. For example, single employer status would have to be found where an individual controlled the labor policies, however different, and owned a shoe factory and a stone quarry![67] The distinction here noted is supported by the holding in the *Concrete Haulers* case,[68] where the Court similarly cited a common labor policy, declaring:

> The interdependence and integrated nature of the operations of the respondents, the common ownership of stock, and the fact that the same officer administers a *common labor policy*, clearly indicate that there is only one employer for the purposes of this Act. (Emphasis supplied.)

The decision in *Concrete Haulers* is not unique; nor is the interpretation unwarranted. The books are replete with cases involving chain organizations and nationwide opera-

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[66]This aspect of what may be called "Attributed violation" is related to the concept of liability for remedy based on common control and fraud, noted *supra*.

[67]We have noted the *KBTM* case, footnote 14, supra, where jurisdiction was taken over a radio station and a grain elevator jointly.

[68]*N. L. R. B.* v. *Concrete Haulers, Inc.*, 212 F. 2d 477, 479 (C. A. 5), enfg. 106 NLRB 690.

tions in which unlawful acts were locally committed and both violation and remedy were limited to the local entity. It might be urged that holding companies generally, because of their ownership and ultimate authority, greater than in the instant case, be held responsible for violations committed by their subsidiaries. The short answer is that, in the absence of proof of liability for the unlawful acts or policies, the Board has not so held, but has limited the liability to the lesser entity. One can consider the Bell System, *supra*, or picture a wholly owned subsidiary whose products are determined completely by the needs of the parent organization, labor relations and employees' activities being nevertheless independent; so that, as relevant here, a violation found against the lesser would not be charged to the parent. Such related situations can be distinguished from the instant one, but they indicate that the findings and conclusions herein are in line with the decided cases.

In short, in these cases, as we consider labor relations and their centralization, the emphasis is not on ownership or general supervision but on the aspect of labor relations which touches the rank-and-file employee. Managerial identity does not make one company or branch liable for the violations of another or liable for remedy, but *common application* of a violative policy or practice does. If this has not been spelled out clearly in the cases, it is implicit in the decisions and needs to be recognized. It has not been shown that Deering Milliken controlled Darlington's labor policies so as to be liable for the latter's violations; or that a joint policy existed under which any other corporation became liable.

It appears both from testimony in exhibit form and from that of Roger and Minot Milliken, whose qualifications are clear, that so-called independent factors and sales agents perform many services similar to those which have

been noted as performed within the Deering Milliken group. It can be argued, of course, as it has been, that in the absence of any adjudication that these others are independent and do not themselves occupy a single employer status, their relationship might prove that they in fact are in such a status. But a general awareness of conditions in this and other industries precludes a finding of that status among factors and sales agents generally and the companies which they serve. When this subject was discussed early in the hearing, the General Counsel contended that, while Deering Milliken renders services similar to those rendered by Iselin Jefferson, the former "does a good bit more." We shall next consider the evidence in this respect: this good bit more has not been shown.

Various other groups within the textile industry have been noted and cited for their bearing here. Thus we have earlier considered the significance of reference to mills by a common or joint name. Testimony was also received concerning joint activities within other groups of companies in the industry which do not occupy a single employer status. (While not as detailed as the evidence concerning Deering Milliken and the instant mills, the evidence offered showed, as by testimony of independent ownership, that the other groups do not occupy such a status. Some of this latter evidence was submitted as of common knowledge; full opportunity was given to refute it at the hearing or in an appendix.) Surely, whatever differences may be argued concerning services performed by independent factors, it is a truism that such services, voluntarily accepted or rejected by Darlington, do not prove single employer status here. While the Union has argued that services performed by an independent factor are not relevant, the fact is that the General Counsel has sought to prove his case by evidence of many services performed; and with such evidence received, it is relevant, indeed necessary if we are to evaluate it, to

inquire whether those services characterize or are compatible with an independent status.

Thus there was submitted a list of 13 firms which are both selling agents and factors and the principal competitors of Deering Milliken, and some of whose officers and directors hold positions in the mills for which they sell. It was testified in general terms that those 13 firms offer services similar in almost all respects and in some instances beyond the services which Deering Milliken offers to the mills here. An example was cited where a factor, as an inducement to an independent mill whose business has been handled elsewhere, promised to set up a production control system, reorganize the mill's cotton buying, help set up a study of work assignments, and make available, for out-of-pocket costs only, a man who would make a study of the mill's machine layout. Examples were also noted of factors and sales agents which deal with mills in which they do not have any ownership interest as well as with mills in which they do. It was reported that one company, which was most prominently mentioned at the hearing, factors for five mills in which neither it nor its directors own any substantial stock interest beyond the minimum necessary to serve as directors of those mills.

These examples further indicate that cooperative or joint efforts in the industry do not establish single employer status. In fact it was testified[69] that factors and sales agents perform identical services for their mills in which they have a large financial interest and for their mills in which they have no financial interest. Thus we are again led to the conclusion that neither the services performed, as earlier described, nor the financial or ownership interest held indicate single employer status: we are back to the question of control of the policies and activities which

[69]All of this testimony makes it unnecessary to rely on or even to cite articles offered by the Respondents on the role and activities of factors.

have been found to be violative. As for control of other activities, this stems from the factoring element itself regardless of ownership or single employer status. Considering a factor's investment and interest, it is not surprising that it weighs and seeks to promote its principals' welfare and that, like other assignees and mortgagees, it concerns itself with insurance, taxes, and other responsibilities of its principals.

If we reflect even briefly on the example cited *supra* concerning CBS stations, we must realize that, whatever their relationship and their treatment under the Federal Communications Act and other statutes, this Board has not found in unfair labor practice cases that such stations occupy a single employer status. A similar realization must emerge as we consider the frequently announced "NBC" and its independent affiliated stations."

The Union early argued that activities and services among other groups of corporations which may not occupy a single employer status are not relevant to the issue of single employer status here: whether such other group has been designated as a single employer or entity needs to be shown. It is true that the status of the other corporations needs to be shown (Board determination with respect to other corporations is no *sine qua non*, but examination of other situations may disclose Board standards), and evidence was received that various ones as noted are independent of one another in management, control, and ownership. With proof of independence, the nature and extent of their joint and mutual activities is relevant here, as has already been suggested; for if joint and mutual activities are relied on in the instant case to prove single employer status, participation in similar activities among independent corporations reflects on the probative value of the evidence first cited here.

The evidence before us indicates that factors and sales agents in the textile industry render to companies which they do not manage or control and which are in an independent as distinguished from a single employer status, many services similar to those performed in the Deering Milliken chain. Groups of independent companies are also referred to as a chain, group, the factor's mills, etc. Whether the corporation shown elsewhere is somewhat more or somewhat less than that among the Deering Milliken mills, the differences from group to group do not warrant a finding of single employer status here. (This is probably a narrower finding than the one already made that all of the evidence of joint effort here does not warrant such a finding.)

The General Counsel has further argued that, while independent or outside purchasing agents operate for gain, purchases are here made and the Service Corporation performs at cost. But it is clear that were charges by DMSC greater, its profits would be divided according to the number of mills or roughly, after more complex bookkeeping and computation, back to those who paid for the services. We must realize also that an improvement obtained at the instance of one mill and perhaps at substantial expense is made available to the other mills; omission of the element of profit tends to equalize the cost to the various mills and avoids a greater burden on the first. As in joint efforts generally, the honestly motivated element of "you scratch my back, I'll scratch yours," more loftily expressed is, in the absence of impropriety and illegality, a mark of industrial progress, as it is of progress in civilization generally; the important element here is that it is voluntary and is not imposed on the corporations by virtue of any outside control.

It is clear that all or various ones of these mill corporations support joint purchase, research, recruitment, acci-

dent prevention and insurance, and other efforts, which are advisory and are deemed helpful. A corporation's appreciation of the element of benefit may determine its inclusion and the extent of its inclusion in such joint efforts, as witness Pacolet's self-limitation to 5 percent in the central cotton warehouse plan. It is also clear that as selling agent and factor Deering Milliken renders important sales (this impinges on styling and manufacturing) and financial, including tax, services. One can recall certain so-called institutes in this and other industries, which are independent: certainly no claim of single employer status has been made to include research organizations, referred to at the hearing, which are maintained by universities or trade schools. To the extent that joint technical efforts and developments are emphasized (and they have been at the hearing and in briefs), one need only note the well-known cooperative institutes maintained or supported by independent companies in various industries—unless it be urged, to cite one example, that the manufacturers of Camel, Lucky Strike, Chesterfield, Old Gold, and other cigarettes, or some of them, occupy a single employer status. Or shall we find such status among corporations in different but related industries because they have joined in forming a company to test food preservation by irradiation in cooperation with the Department of the Army? In all of these, as here, the element of single control of a labor policy everywhere applied is absent.

There are cases where common ownership exists to a lesser extent and cases where assistance to individual corporations is less than here; while in others assistance is greater; and in some ownership is total. But greater attainment of the desideratum of cooperation does not here or elsewhere make the cooperators or their cooperative a single employer. The position of the General Counsel and of the Union, if sustained, would have serious and probably

unintended repercussions on recognized cooperatives. While our concern need not be for cooperatives or other organizations, startling and unintended effects throughout industry suggest that the finding of single employer status would be as startling and uncalled for here.

As for Deering Milliken selling for the various mills, were the sales market staked out and divided in advance, with each mills' products and sales limited to certain constructions and outlets, such an arrangement would be evidence of an integrated structure; but even that would not necessarily show that the various corporations occupy a single employer status. Yet we have no evidence of any staking out of the market and advance limitation of one corporation's production for the benefit of other corporations. In sum, I do not find evidence of such management, direction, control, and ownership as would warrant a finding of single employer status.

The General Counsel and the Union argue for something akin to an isotopic concept of corporate authority. But instead of showing an elemental identity with different characteristics, they have attempted to show that some characteristics or activities are similar and have argued from this that the organizational structure and elements are the same. This argument and the facts shown are insufficient. Thus we have evidence of some activities which are characteristic of integrated or single-employer situations. But if such situations are characterized by certain activities, it is something else to argue and to prove the converse: that the given activities show single employer status. The validity of this last as a proposition in logic should be clear. To cite one instance, various ones of these companies might simultaneously introduce a wage increase. But a similar increase might be placed in effect at the same time in mills which are admittedly not related.

An interesting example of independent corporations in close cooperation is to be seen in the American Telephone & Telegraph Company and the Bell System. Whatever caution may be needed in any comparison with operations in another industry, the general principles indicated there may be helpful in the instant situation. As can be determined from the records of the Federal Communications Commission and the Securities and Exchange Commission,[70] there are 20 principal domestic operating telephone companies each wholly or almost wholly owned by A. T. & T., and 3 operating companies in which A. T. & T. owns a minority of the stock. These 23, with Western Electric Company, Incorporated, Bell Telephone Laboratories, Incorporated, and A. T. & T. itself, comprise the Bell Telephone System. The 25 corporations other than A. T. & T. are and are identified as subsidiaries of A. T. & T. The latter owns almost all of the Western Electric stock, and each of these owns one-half of the Bell Laboratories stock. A. T. & T. is directly represented in the membership of the Board of Directors of each of the operating companies in which it owns a majority of the stock, and it makes advances to the various corporations, which are also referred to as associate companies.

In addition to this close relationship in stock ownership and representation, the research, development, and engineering work for all of the operating companies are provided mainly by Bell Laboratories with some assistance from Western Electric, which manufactures, procures, and installs equipment for the various operating companies and is recognized and referred to as their manufacturing arm and supply unit. The operating telephone companies and A. T. & T. also cooperate in submitting ideas for development by Bell Laboratories.

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[70]See also company directory, Directors, Officers, Principal Organization Heads of the Bell System, May 4, 1959.

It is commonly known[71] that Western Electric functions on behalf of the various operating companies, which are independent in their labor relations and are considered independent for our purposes. The importance of the element of control of labor relations is further emphasized by the fact that various companies associated with Western Electric (these are not operating telephone companies, but among a reputed 3900 independent but associated manufacturing companies) have joined to accept large contracts, as from the Department of the Army. Clearly joint developmental, manufacturing, and sales efforts do not themselves create a single employer status.

The various operating telephone companies cooperate in all activities which involve more than one of them and their respective territories and operations, whether in construction or in customer service; and they share, according to a formula based on the respective amounts of plant involved, in joint revenues as well as in the cost of joint operations. Comparison can here be made with the arrangements in connection with DMSC and DMRC, *supra*.

The Bell System and A. T. & T. names and services are advertised with whatever benefit accrues to the various operating companies. Some system-wide advertising is paid for by the local operating companies according to coverage in addition to their own separate advertising. We can recall what was said *supra* concerning emphasis on the Milliken name in advertising as we note that large advertisements stress the *Bell System's* "large-scale programs of research and improvement."

The following is from "The Bell Telephone System":[72]

> The American Telephone and Telegraph Company coordinates the whole enterprise in five ways: (1) by

[71] Should any party desire to show the contrary with respect to facts officially noticed, an opportunity shall be afforded to do so on timely request.

[72] By Arthur W. Page, Vice President, American Telephone and Telegraph Company, 1941, Harper & Bros., pp. 4-7.

stock ownership in the operating companies, (2) by functioning as a general staff for the operating companies, (3) by furnishing interstate service over its long lines between the different operating companies, (4) by ownership of the Western Electric Company, which manufactures and furnishes apparatus to the manufacturing companies, and (5) by ownership in conjunction with the Western Electric Company of the Bell Telephone Laboratories, which does the research for the improvement of telephone plant and operations.

Despite the high degree of cooperation in operations, the separate corporate setups are recognized, and it would appear that external control is not imposed on the respective corporations. Labor relations of the various companies are independently directed and controlled, and the companies refer to themselves as independent companies connected with the Bell System. While the Board has heard and decided cases involving various ones of these companies, each corporation has been treated as separate and independent: in representation cases, separate units have been recognized; where violations have been found, no company has been charged with the violations of another, and no remedy has been imposed for another's violations. Taking this example of the telephone companies, we can understand that if some of them should in the future jointly control and administer their labor policies, there might be *pro tanto* a joint responsibility; this would be based on such joint labor policy control and administration, not on their joint operations and research and mutual advice, and even if there were no such operations, research, or advice.

Certainly the Bell System and its developmental and engineering work are more closely intertwined with individual telephone companies than with such others as radio and television stations which may also and in lesser degree avail themselves of the opportunities provided by Bell. Such

stations, despite their employment of Bell facilities and improvements, are quite independent of the System.

If unity of purpose establishes an integrated enterprise, as the General Counsel declares, then the Bell System is such an enterprise. But with such a broad definition, integration has no meaning in the context of these proceedings: unity of purpose "to make and sell a wide variety of cloth" would include an entire industry. But such unity does not establish the status which is our concern.

This is not to equate the Bell System with the Deering Milliken system. They are quite different. As differences are pointed out, the argument can be made, as noted *supra*, that failure to urge and prove a relationship elsewhere does not prove that it does not exist here. But we do know at least that such a relationship has not generally been recognized. At any rate—and this at least should be clear—the point is that joinder for certain purposes does not create a joint venture for other purposes or a single employer status.

No more than in what is called and recognized as the Bell System, where from the nature of the business, operation and planning are and must be combined to a great degree—no more than there, do the various corporations here occupy a single employer status. Certainly for purposes of evaluation under the Act herein, there is no such common control of business and labor aspects as to warrant a finding that such a status exists or did exist among the various operating corporations. There is here no such proved relationship as is suggested in the administration and reference to the Western Electric Company as the "manufacturing arm of the Bell System"; yet there has been no claim and no suggestion that, for the violations of the Act by one operating telephone company, another operating company, Western Electric, A. T. & T., or the entire Bell System be held liable, or that a single employer status there exists. Similarly, despite the services rendered to the various telephone

operating companies by Bell System Laboratories, the violations of one of the former under the Act are not chargeable to the latter. Neither the Deering Milliken system nor the Bell System is a single polymastic entity. The various corporations which cooperate in the one are, as in the other, independent in activity and responsibility.

Further detailed comparisons could be made with situations involving apparently independent financing by General Motors Acceptance Corporation despite similarity of name and interest; and with the relations between General Motors Corporation and its franchised dealers with their commonly cited "factory trained mechanics" whose labor relations and terms and conditions of employment are not the responsibility of the "factory." Nor does the occasional employment by an independent dealer of a mechanic formerly employed at the factory make that dealer less independent. Again it may be argued in answer that these other situations have not been passed upon and, were they before us, a finding of single employer status would be made. To this the reply must be that, as has been and will again be pointed out, unless we are ready to make such findings and until there is indication of such readiness, the very opportunity for but absence of similar claims suggests that there should be no recognition of single employer status under these facts. Further, the thoroughness with which the General Counsel and the Union prepared and presented their testimony may reflect on the facts and point the way to the decision, as the paucity of evidence to support the offer of proof is emphasized. Many avenues of contact between Darlington and the other corporations were explored. With respect to some, we have seen that the proof is as compatible with independent status as with single employer relationship. Other joint activities present even less evidence of anything more than a measure of cooperation which frequently characterizes activities in the same industry.

Before leaving the example of General Motors, it should be noted that the automobile industry presents a reverse, although related, situation from that before us: various services are there performed centrally by a single (instead of many) manufacturing organizations[73] for many (instead of one) sales agents. Yet, although all dealers must operate in a certain manner as provided in their franchise contracts, must maintain their business in a certain form, must operate in a given manner, etc., etc. (the central name is also emphasized for advertising purposes), there has been no suggestion of a claim nor any finding of single employer status embracing a manufacturer and its dealers.[74] True, the element of common ownership does not there exist; but that element, absent others which are probative, insufficiently suggests that the corporate veil be pierced.

With the awareness that comprehensive advertising is not unusual although those who join in it are and have been considered to be independent corporations, we can better appreciate the testimony noted *supra* concerning advertising the Milliken name. This also sheds light on a large-size, 24-page (including its glossy covers), well-illustrated booklet entitled "Fabric Magic by Milliken." This booklet was produced in 1952 at Deering Milliken's expense and distributed at a dinner to which store representatives, including buyers, and synthetic fibre manufacturer representatives

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[73]Despite company-wide bargaining, jurisdiction is assumed of individual plants and the remedy for discrimination at one plant is imposed against that plant alone. See, for example, *Chrysler Corporation (Ohio Stamping Plant)*, 119 NLRB 1312; *Chrysler Corporation*, 54 NLRB 510; *Ford Motor Company, Aircraft Engine Division*, 96 NLRB 1075; *General Motors Corporation, Chevrolet Forge Plant, Detroit*, 114 NLRB 234; *General Motors Corporation, Cadillac Motor Car Division*, 109 NLRB 1429.

[74]The Board has even refused to assume jurisdiction over a dealer or agency whose commerce facts did not meet the Board's standards, and without regard to the manufacturer's commerce. See *Wilson-Oldsmobile*, 110 NLRB 534.

were invited. From the introductory sentences[75] inside the front cover, indeed beginning with the title on the cover, reference throughout is to what Deering Milliken creates and produces, to magnificent mills, to Milliken's engineering and fabric development by the Research Trust, now DMRC. Then there are descriptions of *Milliken's* fabrics: Milliken's dacron-worsted, Milliken's brand name of Milium, Lorette, Cuenella, Vicinette, Bunara, etc. "Milliken specialists set out to 'engineer' " these magic fabrics.

But the looseness of these characterizations is indicated by early reference to "the mills associated with Milliken," and later, several times to "mills with Milliken." Then appear the statement that "Milliken represents the widest variety of modern mills," and a reference to "the mills served by Milliken." Later we are told that "the textile team with Milliken (is) a group of specialist mills . . . *closely integrated* to control—from start to finish—the properties, costs and quality of the fabrics they produce," and we find the phrase "the integrated group of mills with Milliken." Teamwork, it was explained, means "to pull in the same direction." The meaning and effect of integration of operations has already been considered; cooperation in suc-

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[75]These read as follows:

> This is the story of Magic Fabric and of what makes it possible. It weaves a tale of textile adventure—of new fabrics created *first* by Milliken through the wizardry of science—of standard fabrics produced in thousandfold varieties—of mills magnificent even by modern measure—of the many millions spent to equip them, the up-to-date machinery to power them —of textile technicians highly proficient in their art.
>
> Here is the magic of American textile pioneering and teamwork and know-how—and here is the evidence of a faith in the future, founded in the wisdom of nearly ninety years of progress in producing more quality in textiles of all types for more people.

At the bottom of the page is one line:

> Deering, Milliken & Co., Inc. . . . "quality-controlled textiles in quantity"

cessive stages of manufacture (this does not appear to have applied generally to Darlington) does not prove single employer status, and we have seen that Darlington's operations and the decisions as to what it would make were determined by itself, not by any other corporation. The booklet also refers to central cotton buying and research, both of which have been considered *supra*. The very reference to "central cotton buying offices" may suggest separate mills and perhaps even their independence; certainly central buying could without mention more readily be assumed where single employer status exists although it might also be pointed out (not assumed) where operations are scattered. Nor does reference to "Selective Buying By Milliken" alter the fact that the raw material is in fact bought and paid for by the mills themselves.

When the booklet mentions both Deering Milliken and the mills, it is "Milliken and the Mills," not Milliken and *its* mills. Finally, as the history of Deering Milliken and its operations are traced, we read of the "Deering, Milliken Company" and its expansion; then of "its associating with many cotton mills in the South"; and of the building of "new mill affiliates." It was testified at the hearing that this association was "as selling agent" for the mills, and that it is stated on every sales note that Deering Milliken is acting as agent for the given mill corporation.

The meaning of all this can be summed up in the phrases "There are Fabrics from Milliken for 'most Every Need . . . ," and *"you can get them all at Milliken."* The name Milliken is advertised and re-emphasized; the attempt is consistently made to identify the products which Deering Milliken sells and the mills which produce them, with Deering Milliken and particularly with the name Milliken. But if such identification has in fact been effected in the industry and among the public, we have no more than the identifica-

tion noted in such terms as Chevrolet agency and Ford dealer. That the name Milliken means a great deal in the textile market, as brought out by counsel for the Union, is a reason for mills jumping on the bandwagon and associating themselves with that name. But it need not provide incentive for mills' surrender of independence or control, nor does it prove single employer status.

The question can first be raised whether these statements or, in such a context, others perhaps more suggestive than these of common ownership, control, and even single employer status, are to be taken as admissions; or whether, used for advertising purposes, they would be classified as puffing or self-praise for the purpose immediately at hand, which did not involve labor relations or mill employees. After all, our concern is with the facts of reationship, and, while statements made and brochures prepared may shed light on the facts, such material is to be evaluated in context. Nor is there any question of estoppel to deny or limit the presentation made in the exhibit; it was not prepared for, submitted to, or connected with the employees of any of the mills or the bargaining representative of any employees.

In determining whether this exhibit, in its emphasis on Deering Milliken's leadership while recognizing the important role played by the mills, indicates single employer status, we can consider the similar emphasis on Ford, Mercury, Chevrolet, Buick, Plymouth, Chrysler in the simultaneous nationwide first showing of each of these in their new models. There too the identity of the local organization is submerged; arrangements are controlled at the center, and this despite the fact that the public unveiling does not occur at the center equivalent of the Waldorf-Astoria, where "Fabric Magic" was unveiled, but at the various local sites. Neither in the one case nor in the other, neither at Ford nor at Deering Milliken does the emphasis on centrality in-

dicate single employer status of the corporations involved.[76] Here is but another instance where a peripheral activity is cited in the absence of proof of control and joint policy with respect to the labor relations activities which concern us.

Returning to the analysis of the cases cited by the General Counsel and the Union, if counsel are unable to show that the instant case contains the elements on which the Board and the Courts rely in finding single employer status, they may nevertheless and do urge the presence of facts otherwise sufficient to show such status here. In the absence of a similar case as precedent, the instant case must stand by itself. Of course the facts in each situation are different; but, if one situation does not determine or point the way to solution in another, there is nothing in the Board's decisions to warrant a finding of single employer status here. Considering, as we must, the law and the Board's policy in cases involving other companies, it should be clear that a finding of single employer status here would not only be novel; it would be at variance with other decisions and indicated policy as well as with the law and the facts herein found.

The importance of the element of control may further be seen if we consider the cases which involve the question of union responsibility. Even where organizational relationship of local and parent international is admitted, the issue of responsibility rests, not on such relationship, but on the evidence concerning joint pursuit of a common objective, i.e., on express assumption of control as in consti-

[76] We have noted *supra* the contrast between the instant situation and that of one manufacturer with many so-called sales agencies. Again, here the advertising emphasis is on one name at the location of the single sales agent; in the automobile industry the emphasis is similarly on one name, but at the several sites of the various sales agents. The advertising purpose in each case explains the locus of such advertising.

tution or bylaws or on actual commission of violative acts on behalf of each.[77]

Since the hearing and in the course of further consideration of the evidence, many thoughts and different ways of expressing them have come to mind. These have been set down and in large measure here submitted. An approach, a concept, an expression which may not be persuasive to one may be to another. (—And this report will pass through many hands before decision.) This may be said to parallel the efforts of the General Counsel and the Union as they offered a great variety of evidence which they hoped might separately or collectively support their position. Having come to a conclusion on the basis of the hearing and the evidence adduced, and required to state my findings, conclusions, and recommendations and to give reasons, I am now the proponent for those findings, conclusions, and recommendations; and I have presented the reasons called for so that they may appear to be reasonable and persuasive. Where differences of opinion so frequently appear, reason may unfortunately be in the mind, if not in the eye, of the beholder or viewer.

All that has been said to this point, the reasons, the analogies, the arguments, may be persuasive even if not to all litigants and partisans. (Experience indicates that objections or interpretations not yet voiced must be anticipated, and what is clear from one viewpoint may not be from another so that detailed clarification may be advisable; withal this report is written for the Judicial mind, not for a

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[77] *Hitchman Coal and Coke Company* v. *B. Mitchell, etc.*, 245 U. S. 229, 249; *National Maritime Union, AFL-CIO (Standard Oil Company)*, 121 NLRB 208. Cf. *Millwrights' Local 2232, Carpenters (Farnsworth & Chambers, Inc.)*, 122 NLRB No. 41, where the Board found that, under the International's constitution, locals are "subject to its laws and usages"; and that the International *controlled* the Local's acts and compelled the violations found. No such control or compulsion is here found. Cf. also, *The Marley Company*, 117 NLRB 107.

general audience or the reading public.) But since "What's past is prologue," what has been noted in detail needs to be summarized. My findings have already been several times stated. But the realization that it has been necessary to explain in various and many ways that the discrimination here was general, not individually directed, that there is no practical remedy at this point, and that the situation is not one which can easily be repeated—all of this suggests the advisability of restating the findings in different fashion to anticipate and guard against a misconception of the evidence before us and a conclusion which may not be supported by the record.

The need to proceed thus apparently exists, whether because the case has been considered by too many or not sufficiently considered by any, although the Board has yet to declare its ultimate conclusions. In remanding the proceeding, the Board may have assumed and relied on the claims made by the Union's counsel in his early offer of proof. Aside from the question of relevancy pointed out in the dissent on remand, it is now clear that these claims of fact have not been supported.[78] This is not to say that these corporations deal with each other at arm's length; they do not. But it is one thing to find cooperation, even intimacy, and another to declare single employer status with common control and mutual liability.

The general standards recognized have made it clear from the beginning that our problem here would be and is to relate the evidence to those standards. Whatever differences may appear in different evaluations of that evidence,

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[78]Regardless of the "ultimate" conclusion, I am unable to endorse the General Counsel's statement that the "signposts . . . are clear and outstanding," and the conclusion for which he argues "inescapable." Were he correct in this, it would probably have been unnecessary (although the contrary is logically possible) to seek so many signposts and to take so much time and offer so much evidence in the attempt to attain the conclusion thus urged and indeed to escape a contrary conclusion.

the conclusion can reasonably be only that, with full recognition of those items which are compatible with single employer status and some which even suggest it, such status, or in the General Counsel's words the requisite "degree of centralization of the necessary functions," has not been shown to exist among the various corporations here or, more narrowly, between Darlington and other corporations.

We have employed different phrases which indicate different degrees of relationship; and we have seen that the proof for assumption of jurisdiction, for example, may not suffice for a finding of liability by a different entity and ultimately for a finding of control and then single employer status. "Single employer" suggests a very close relationship, and indeed a very close relationship is a requisite to extension of findings of violation or of a requirement for remedy.

It has already been noted that, were evidence available which indicates single employer status, that could be set forth with reasonable brevity. In the absence of such evidence, it would probably not be satisfactory to announce only that the evidence needed for the finding thus sought has not been submitted. What has appeared to come closest to the General Counsel's and the Union's position has therefore been detailed and considered to the conclusion that even such evidence, much less the remainder, has not indicated single employer status.

One further reminder: I have not overlooked but I reject the argument that the number of factors which are consonant with single employer status, even if none of them depends on or proves such status, proves the General Counsel's case. On the contrary, it cannot reasonably be denied that, since each might exist in an independent setup, all are consistent with such a setup. Here again, as repeated throughout the hearing, we have the distinction between cooperation and control, particularly in labor relations. A

finding of single employer status might avoid the problem of remedy noted at the first hearing herein and the first Intermediate Report. But even if an arcane mystery must be faced, the finding is that such a status has not been shown.

The ingenuity which was testified to at the original hearing, which was so impressive, and which was recognized and discussed in the earlier Intermediate Report was Darlington's. In all of the testimony at the various hearings there is nothing to indicate that, faced with manufacturing, competitive market, and other problems, Darlington relied on or could have relied on another mill or corporation for more than those services which are commonly available to independent mill corporations. Whether the related corporations or any of them faced similar problems, we do not know. There is no evidence that all marched together in solving and meeting problems or that survival of any depended on ingenuity by phalanx. Oeland's problems differed from those elsewhere, and the corporations had varied success in solving their problems.

Conceivably, Deering Milliken might have provided Darlington's capital, and by agreement have had a lien on or full title to property in Darlington's possession, all without being an *alter ego* or creating a single employer status. We are dealing with labor relations and the violations of the Act which have been found. The relationship between Deering Milliken and Darlington does not embrace such relations. Their cooperation in financial, technical, and administrative matters did not impinge on or affect Darlington's full and sole control of its labor relations. Whatever the elements of advice, assistance, and cooperation here (1) they do not extend to joint control over Darlington and other corporations, and (2) they do not cover Darlington's labor relations. Whatever the General Counsel's and the Union's hope, whatever their wish, they cannot reasonably

believe that the facts adduced show single employer status. Certainly I do not. The General Counsel's attempt to analogize the situation here with that of the General Counsel of the Board in Washington and his 35 field offices must fail. The difference between the two cases with respect to autonomy and control whether, as he cites, in decisions, help (or guidance or direction) from Washington, or transfers is too clear to require elucidation for those who, like the Board, are acquainted with the General Counsel's organization and who will acquaint themselves with the facts in this proceeding.

After the issue of violation comes that of liability, and as to that it does not appear that the relationship between Darlington and any or all of the other corporations is such as to make the latter or any of them liable for Darlington's violations. As for remedy, there is no evidence of *alter ego* continuance of operations or management, transfer of machinery, orders, profits, etc., or even legal successorship to Darlington, which could warrant imposition of a remedy on any of the other corporations. No corporate veil is here being employed to hide unlawful activities or to evade lawful responsibility, and there is none to be pierced. A contrary conclusion would constitute a roadblock on the highway of interpretation or analysis of the corporate structure and its significance. The exceptions for modifying or setting aside the concept of limited corporate liability do not apply here; and there is no basis for finding single employer status or for imposing one corporation's liability, whether potential but nonexistent, or *in esse*, on the others.

The additional evidence which the Board directed be taken has been received. It is neither necessary to support, nor does it, in the language of the dissent from the remand order, "support the complaint and prove the illegal motivation behind the closing of the Respondent (sic) plant." In ordering the remand, the Board decided to proceed

"without regard to the original (sic) purpose of the Union's offer of proof." However the Board, in "giving thorough and final consideration to the issues in this case," may evaluate this additional evidence, such evidence does not affect my findings, conclusions, or recommendations of April 30, 1957, on the issues framed by the pleadings and tried in this case; nor was it offered to modify those findings, conclusions, or recommendations, to which exceptions have long since been filed.

With respect to the amended complaint, the proof indicates no basis or warrant for finding either that violation was committed by any individual or corporation other than Darlington (specifically, there was no violation by Deering Milliken), or that liability for remedy may be imposed on any other.

I find from all of the evidence as implemented by the arguments and briefs of counsel at and since the hearing, that Darlington, in the terms of the offer of proof and the remand order, is not "but one in a chain of about 30 mills whose operations and labor relations are controlled by Deering, Milliken, & Co., Inc.," and that Darlington does not occupy a single employer status with the other corporations or any of them.

With this synoptic if itself lengthy treatment of the words, perhaps running into the millions, of oral and written testimony and argument, let us inquire, What might conceivably be found here which could reflect on possible remedy? No basis has been shown for directing any other mill to employ Darlington employees. Nor can they be employed by Deering Milliken, DMSC, or DMRC. So much for "reinstatement to their former or substantially equivalent positions." As for backpay, Darlington's remaining assets on hand are presumably sufficient under most of the remedies proposed against Darlington and unless employment in the other mills were directed; and

in the latter eventuality, those mills could with equal legality be directed to make the employees whole! But since it does not appear to me to be even remotely possible that employment in the other mills will be directed, the question remains, What might conceivably be found here which could reflect on possible remedy? Aside from the objections such as those noted in the dissent to the order of December 16, 1957, to requiring this labor, we have indeed labored but brought forth not even a mouse.

This is the third Intermediate Report in this proceeding, the first, as noted, having been issued 2½ years ago. It appears that the Board will review all three jointly.

I have consistently attempted to apply the law to the facts as found. I have recognized ideas and attempts, and anticipate more, to prevent a "social wrong" and to promote what is "fair." But this is not the occasion to debate social problems; and any who seek to achieve what they deem to be social improvements must, whatever their disappointment, seek elsewhere and in a different forum. We do not here consider the question whether the legislature should or would react to arguments addressed to the "good of the country." Whether there be agreement or not with my findings, conclusions, and recommendations, and whatever may lie within the tropics of anyone's heart, this must be recognized as a proceeding which does not create rights but finds and declares them as established by the Act and the cases. In this connection I would quote from a recent opinion of Chief Judge Hutcheson, himself quoting as follows:[79]

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[79] *Refinery Employees* v. *Continental Oil Company*, 268 F. 2d 447, 460 (C. A. 5), concurring opinion, quoting from Holdsworth, *Some Lessons from Our Legal History*, page 105. See also footnote 13, *supra*.

> Philosophical speculation about law and politics is an attractive pursuit. A small knowledge of the rules of law, a sympathy with hardships which have been observed and a little ingenuity, are sufficient to make a very pretty theory. It is a harder task to become a master of Anglo-American law by using the history of that law to discover the principles which underlie its rules, and to elucidate the manner in which these principles have been developed and adapted to meet the infinite complexities of life in different ages. Such students of our law will learn even though at second hand, something of the practical wisdom which comes from knowledge of affairs. They will for that reason be able to suggest solutions of present problems which will depend not merely on their own unaided genius, but on the accumulated wisdom of the past.

An official who had no connection with this proceeding at the time of the hearings has recently but unofficially declared: "Where the administrative responsibility requires interpretation of the law, it is necessary to find a reflection of the common will in the way that the law-making body intended." At the risk of causing some unhappiness and even arousing displeasure (how frequently can that be avoided in deciding these cases?), I do not conceive it to be my duty or even my prerogative "to find a reflection of the common will." It is necessary "to find . . . the way that the law-making body intended"; and that is indicated in statute and decisions.

This is no sociological[80] problem, but a legal one. It is not for us here to strive to bring grapes of Eshcol to some who seek relief; our function is to recognize existing rights

[80]We have seen that the remand hearing lay beyond the scope of the legal involved, and even of the administrative questions raised by the pleadings. Whether or not the remand was born in whole or in part of a sociological emphasis, it may have encouraged such emphasis by presentation of the issue of "empire."

and liabilities. To quote Judge Prettyman again, "The function of an administrative agency is the administration of law—no more, no less."[81] This is as true of the trial examiner's function.

Substantial evidence on the record as a whole must be our *modus decidendi* and our decisional cockade. As we consider our freedom, our responsibilities, and our rights, any other gonfalon unfurled will be seen to be a "pestilence that walketh in darkness; . . . destruction that wasteth at noonday."[82]

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

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[81] *Trial by Agency*, page 10.

[82] Psa. 91:6.

Conclusions of Law[83]

1. Deering, Milliken & Co., Inc., does not control the operations or labor relations of Darlington Manufacturing Company.

2. Darlington Manufacturing Company does not occupy a single employer status with "related"[84] or other corporations.

3. Deering, Milliken & Co., Inc., has not engaged in unfair labor practices within the meaning of Section 8(a)(5), (3), or (1) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend:

1. That the complaint be dismissed as to Deering, Milliken & Co., Inc.

2. That any claim herein against "related corporations" because of alleged single employer status be dismissed.

Dated at Washington, D. C., this 31st day of December 1959.

LLOYD BUCHANAN
Lloyd Buchanan
Trial Examiner

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[83]These conclusions supplement those in the Intermediate Report of April 30, 1957. As to the Respondent Roger Milliken, reference is made to the Board's order of October 22, 1958, and the Intermediate Report of April 30, 1959.

[84]Thus designated in the Board's order of December 16, 1957.

APPENDIX A

Exhibit A

The officers of Deering, Milliken & Co., Inc. are:

Roger Milliken	President
Gerrish H. Milliken, Jr.	Vice-President and Assistant Treasurer
Seth M. Milliken	Vice-President
J. C. Harris	Vice-President
A. J. Dillard	Vice-President
W. Kuenzel	Vice-President
Harold A. Hatch	Vice-President and Assistant Treasurer
Joseph R. Smith	Vice-President and Assistant Treasurer
Minot K. Milliken	Vice-President and Treasurer
Francis G. Kingsley	Vice-President
I. P. Crowther	Vice-President
Alexander J. May	Vice-President
Charles W. Kable, Jr.	Secretary and Assistant Treasurer
E. P. Flanigan	Comptroller and Assistant Treasurer

The directors of Deering, Milliken & Co., Inc. are:

Roger Milliken
Gerrish H. Milliken, Jr.
Minot K. Milliken
Francis G. Kingsley
Harold A. Hatch

The officers of Darlington Manufacturing Company are:

Roger Milliken	President
H. A. Hatch	Vice-President
J. M. Oeland	Secretary and Treasurer
C. W. Kable, Jr.	Assistant Treasurer

The directors of Darlington Manufacturing Company are:

F. G. Kingsley	Resigned September 12, 1956
H. A. Hatch	
J. H. Lyles	
Minot K. Milliken	
Roger Milliken	
W. S. Nicholson	
J. M. Oeland	
G. H. Milliken, Jr.	Elected September 12, 1956, in place of Mr. Kingsley

Supplemental Intermediate Report (1959)

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

DIVISION OF TRIAL EXAMINERS

WASHINGTON, D. C.

DARLINGTON MANUFACTURING COMPANY ROGER MILLIKEN DEERING, MILLIKEN & CO., INC.[1] and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO	Case No. 11-CA-1071

Mr. Jerry B. Stone, for the General Counsel.

Messrs. Townley, Updike, Carter & Rodgers, of New York, N. Y., by *Mr. John R. Schoemer, Jr.*, for Deering, Milliken & Co., Inc.

Messrs. Price & Poag, of Greenville, S. C., by *Mr. John R. Schoemer, Jr.*, for Darlington Manufacturing Company.

Mr. Gerald A. McCarville, of New York, N. Y., for Roger Milliken.

Miss Patricia E. Eames, of New York, N. Y., for the Union.

[1]All findings, conclusions, recommendations, and responsibility with respect to Deering, Milliken & Co., Inc., herein attach to Deering, Milliken, Inc., its successor by merger and change of name.

SECOND SUPPLEMENTAL INTERMEDIATE REPORT AND RECOMMENDED ORDER

BUCHANAN, Trial Examiner: Delay in the decision of this case has brought forth further hearings, required additional Intermediate Reports, and encouraged desperate dialectics. Bearing in mind that our concern has been with the situation in and about 1956, this instalment might well be called The Apotheosis of The Insignificant. (This is intended, not in disparagement of the parties, counsel, or any of them but as encouragement to a decision more effective and determinative than the Trial Examiner's Reports, first made a long time ago and then several times since.) The portion immediately before us has already been on preliminary inspection by the courts and has extended by more than 1 year the serialization of the problems involved.

The Intermediate Reports issued herein on April 30, 1957, April 30, 1959, and December 31, 1959, were before the Board when by notice of motion dated January 9, 1961, the Union moved that the Board remand the proceeding to receive newly discovered evidence. The Board granted this motion on February 15, 1961, and proceedings then were held in the United States District Court for the Middle District of North Carolina and in the United States Court of Appeals for the Fourth Circuit. Thereafter a notice of hearing issued on January 22, 1962, and a hearing was held before me on February 5, 1962, at Winston-Salem, North Carolina.

The issue at this hearing concerned the merger of Deering Milliken & Co., Inc., into Cotwool Manufacturing Corporation and the effect thereof on any responsibility of the former or its successor, Deering, Milliken, Inc., for the unfair labor practices of Darlington or to remedy those unfair labor practices.

At the close of the hearing, counsel were heard in brief oral argument. Pursuant to leave given to all parties, briefs have been filed by the General Counsel, the Union, and the Respondents, the time to do so having been extended.

The stipulations and testimony concerning the relationship between Deering, Millken & Co., Inc. (and its successors) and the various mill corporations in 1960, received at the hearing, are by the remand, deemed material to the present inquiry. Although reference will necessarily be made to the evidence with respect to other mills, I consider it unnecessary to go beyond the relationship between Deering, Milliken and Co., Inc., and Darlington since that is the primary issue to be determined in connection with the question of responsibility which is before us. The evidence here is to be weighed and, by a process of working backward as urged by the General Counsel, deductions are to be made concerning the situation as it existed in 1956, with a finding that Deering, Milliken and Co., Inc., "had caused the discrimination." (This letter is not quite the same as the claim of single employer status.)

By comparison with the problems previously considered, the additional matters offered at this hearing provide relatively little problem. The issue litigated in the second hearing and covered in the third Intermediate Report was the relationship between Deering, Milliken & Co., Inc., and Darlington, and the conclusion was limited to that; that hearing, although left open for a time for the purpose, was not extended to the relationship between the former and the various other corporations. In this latest hearing, our inquiry although more brief refers to the various manufacturing companies.

There is neither conflict nor contradiction with respect to the facts adduced; the lone witness now called, Minot K. Milliken, who had previously testified as vice president, treasurer, and a director of Deering, Milliken & Co., Inc.,

was not cross-examined. But the opinions of the parties and their arguments based on these facts are antipodal.

The exhibits received at this hearing were primarily offered and received as background to support and explain the oral testimony and the action taken. They have been examined and relied on to the extent that the parties have themselves indicated and relied on them. Upon the entire record at this hearing, considered both separately and in conjunction with the record previously made in this case, I make the following:

Findings of Fact (with reasons therefor)

In the spring of 1960 Deering, Milliken & Co., Inc., heretofore admitted and found to be a sales and factoring corporation, and The Cotwool Manufacturing Corporation, a manufacturing corporation which owned (in the generic sense) a number of mills, were merged; and the new entity by change of name is now known as Deering, Milliken, Inc. The latter is a manufacturing, sales, and factoring organization, and the Respondents point out that for the first time here all of those functions are performed by one corporation. The General Counsel has previously and now seeks to show that all of these functions, particularly the first, were performed by Deering, Milliken & Co., Inc., in and about 1956 with special reference to Darlington.

Working determinedly, but necessarily within the limit of available facts, the General Counsel has brought out that the merger was effected after a series of informal meetings which began in the late autumn of 1959 or January 1960 and were attended by Roger Milliken, Minot K. Milliken, Francis G. Kingsley, and Gerrish H. Milliken, each of whom was and is an officer of both Deering, Milliken & Co., Inc., and Cotwool. (Minot Milliken testified that not a week went by but he discussed some phase of the business of the

two companies.) The first formal meeting of the directors of both corporations was held on April 5, 1960; and the merger or reorganization was formally agreed upon in May and consummated, it was indicated, in June 1960 and thereafter.

Members of the Milliken family i.e., descendants of Seth Milliken, collectively owned a majority of the shares of both merging corporations, but individual ownership by the various descendants was not the same in both. Some owned stock in one of the companies, some in both but in different amounts. Stock ownership was quite different after the merger, the holders of shares of Deering, Milliken, Inc., owning aliquot interests in the combined assets.

Minot Milliken testified that the merger was prompted by two factors: administrative problems, and tax considerations of growing significance. The latter were not explored, but concerning the administrative problems it was explained that there had been a conflict of interest between Deering, Milliken & Co., Inc., whose costs had been increasing as its services for Cotwool had been expanding, and Cotwool, which was the beneficiary of those expanding services. The meetings were held and action taken to provide a fair arrangement among the stockholders of both companies.

For whatever conclusions may be argued from this, we may note that after the merger, and in the latter part of 1960, several subsidiaries of Cotwool (by that time presumably subsidiaries of the new corporation) were in status merged into the parent company. The motion for the instant remand was based on the announcement of the new divisional setup in connection with these latter mergers. The press release was prepared by Roger Milliken, who was president of the merged corporations and is president of Deering, Milliken, Inc.

We have seen that as between Deering, Milliken & Co., Inc., and Cotwool, the merger was accomplished to resolve

administrative problems and to obtain tax advantages. It was brought out that since the merger, Deering, Milliken, Inc., has continued the selling and factoring functions formerly performed by Deering, Milliken & Co., Inc., and that with former Cotwool employees it has continued Cotwool's manufacturing operations. All of this, including an equitable arrangement to cover services and charges therefor, could be accomplished by previously wholly independent companies.

In this connection we note the testimony that the reporting methods were not changed after the merger: that boards of directors of the affected mills were changed, but the officers and managing personnel retained their prior functions; and that there has been no substantial change in methods with respect to sales, in insurance plans covering the former Cotwool mills, vacation plans, purchasing arrangements, technical assistance to mills, or recruitment policy (these considered in the Intermediate Report of December 31, 1959). All of this is as consonant with independent status before merger and certainly with absence of that measure of control which here concerns us as with the earlier single employer status which has been alleged. In the affidavit in support of the motion for this remand it is stated that the manufacturing divisions *may* have existed for many years. (That they were owned by or divisions of Cotwool, not of Deering, Milliken & Co., Inc., has been explained.) It can similarly be urged that the merger may be indicative of prior single employer status; but by the same token, it may not be: The fact of status prior to the merger and specifically in 1956 needs to be proved.

Merger to effect a more equitable arrangement does not prove a pre-existing single employer status. Rather, such a status might result in informal changes and transfers without a merger. Nor is that status shown by a subsequent merger to achieve savings.

Neither does it appear that the relationship and problems between Cotwool and Deering, Milliken & Co., Inc., were similar to those between the latter and the cotton goods mills generally and Darlington specifically. In fact it was testified that the administrative problems so-called did not exist with respect to the cotton mills. The merger before us was prompted by problems with respect to mills owned by Cotwool, and *other* than and different from any with which we have been concerned.

In short, the current aspect of these proceedings can be summarized as follows: Deering, Milliken & Co., Inc., denying that it controlled Darlington and was in a single employer status with it, had claimed that it was not itself a manufacturing company. The published stories which emanated from the press release of December 28, 1960, indicate that Deering, Milliken, Inc., which had been formed from the merger of Cotwool Manufacturing Corporation and Deering, Milliken & Co., Inc., is a manufacturing company, and thus appeared to give the lie to the claim previously made by the latter and analyzed in the Intermediate Report of December 31, 1959. The evidence now received shows that the Union's impression noted in the motion of January 9, 1961, was erroneous, and that the manufacturing functions of Deering, Milliken, Inc., stemmed from Cotwool and mills which Cotwool had controlled. In fact, most of the mills listed in the release were, in a single exhibit received at an earlier hearing, shown to be divisions or subsidiaries of Cotwool. The General Counsel urges that what appear to be descriptive references to retention and continuance of duties at other mills (in one case the phrase used is "also is Treasurer . . .") reveal "a recognition that the entire entity included" such other mills; the Union's argument is that these references show that the new corporation took for granted that it controlled the non

wholly-owned mills. I find that although now included in the divisions of Deering, Milliken, Inc., the mills actually covered by the release have not ben shown to have borne such a relation to Deering, Milliken & Co., Inc.

In the Intermediate Report of December 31, 1959, cases were cited to show that where, under the conditions there detailed, there is no joint labor policy or exercise of control over labor policies, even common ownership does not make one entity liable for violations of another. Conceivably what was said or done in 1960 might indicate such necessary control as would warrant a finding of common liability. But for such a finding as of 1956, we must now find that the vital elements of control were exercised at that time. Continuity must be shown in order to connect the 1956 situation with the 1960 events so that by a process of working backward the subsequent can be related to and equated with the prior. Events and activities among certain companies in 1960 do not *ipso facto* relate to our 1956 situation, and the question remains, what were the facts in 1956?

Aside from the absence of necessary proof of single employer status in 1960, I can see no sufficient relevance of events among other companies in 1960 to the issue before us, that issue being single employer status as a basis for the liability which was created in 1956. Evidence of events in 1960 shows no more than relationship between Deering, Milliken & Co., Inc., and certain corporations other than Darlington; it does not show this as of 1956 with respect to Darlington, which cannot be substituted for the corporations cited as of 1960. I therefore find that the evidence received concerning Deering, Milliken & Co., Inc., and other corporations in 1960 does not affect the findings made concerning single employer status when, as previously found, the Act was violated and when Darlington became liable for such violations. Nor does this evidence indicate liability by succession to Darlington's obligations and responsibilities.

Insofar as succession is concerned, and without repeating the examples cited and the analysis made in the Intermediate Report of December 31, 1959, it may be said (until the Board speaks otherwise) that where the element of control there described has not been shown, the test of liability of one entity for the violations by another is as follows: Referring to the entity which is now sought to be held, has that entity taken over or succeeded to the assets and interests of the violator other than at arm's length as by a *bona fide* purchase for value or an open market acquisition? Thus for example, aside from control, an *alter ego* attempt to act for the violator, a preferential transfer and attempt to continue the violator's business merely under another name—these would indicate liability of the successor. It is that very element of identity or substitution which provides the basis for a finding of liability where there is common control or general transferability. For in these latter situations the community or continuance of control provides the element of benefit which has been obtained or sought by a preferential assumption while the concomitant liability found has been evaded. But as the analysis of the evidence previously received has shown, preference and evasion have not been shown.

The instant hearing has thus brought the answer to several questions posed by the remand application, as noted in the Circuit Court's opinion of October 13, 1961. We now have the facts concerning the merger of Deering, Milliken & Co., Inc., and Cotwool. It has not been shown that the press "announcement (of December 1960) was inconsistent with the earlier contention of Deering, Milliken & Co., Inc. that it was not engaged in manufacturing operations." That announcement referred to fine goods, worsted, and woolen divisions, not to print cloth mills, like Darlington, as the Circuit Court pointed out. Control of mills by the new Deering, Milliken, Inc., through its succession to Cotwool does not show prior control by Deer-

ing, Milliken & Co., Inc. Cotwool's control of various mills in 1960 does not indicate that it similarly controlled Darlington in 1956, or that Darlington did. Nor are the 1960 activities connected with Darlington, which has not existed for several years except perhaps by prolongation because of these proceedings.

Despite the passage of time, the Report of April 30, 1957, is and will be before the Board for consideration, and it may be of some help to allude here to an argument which, if not raised before me may nevertheless at some time be deemed worthy of resolution. This is that backpay should be awarded until the date when Darlington officially "ceased its existence." But the answer to that proposal or argument is that the question of remedy resolves not around Darlington's existence as a corporation but around its continuance of operations, when employees could work and be paid. Were the argument of continued existence followed, what would be said were the respondent an individual rather than a corporation?

As for any concern[2] over the absence of deterrent to commission of unfair labor practices if a violator is permitted to go scot-free, i.e., without application of a backpay and reinstatment remedy, it should be noted that such circumstances are self-limiting. The Board has not been deluged with such cases, and for good reason. This situation exists only where the employer goes out of business, a drastic step indeed to avoid the usual remedy. Quite different are cases (some of these will be noted *infra*) of plant removal, sale, partial closing, etc.

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[2]It is within the Board's functions to consider practical effects, as it does. With respect to concern for the effect of the recommendations, the Board has in another connection stated: ". . . any conclusion as to the detrimental effects of the Act here would be born of speculation, and we do not believe that speculation is a sufficient basis to support a finding that it will not effectuate the national policies set forth in the Act to proceed in the case." (*West India Fruit and Steamship Company, Inc.*), 130 NLRB 343, 366.

In the Supplemental Report of December 31, 1959, I declared that no objection was raised to bringing in of the additional respondents in that remand proceeding. The transcript shows that counsel for the respondents was there willing to have the proceeding extended to all who had previously been served with a charge. In view of my findings, it appeared unnecessary to explain further or to support my declaration to that effect. Since the respondents thereafter questioned this, it may at this time be pointed out that the limitation of Section 10(b) of the Act is against issuance of an unfair labor practice complaint against a person not served with a timely charge; but that the statutory limitation does not apply where the General Counsel seeks to extend the remedy only and where *alter ego* or single employer status exists.[3] Hence, "jurisdiction" may be extended for purposes of remedy where single employer status is shown. However strained some arguments in the past in support of jurisdiction (these have frequently been based on little more than a sense of necessity and nebulous "justice"); however skillful, as in the instant case, the arguments *contra;* the distinction between unfair labor practice violation and liability for remedy should be clear, as should be the limitation of Section 10(b) to the former.

Since this is a Supplemental Intermediate Report, it may be helpful to consider briefly some decisions which the Board has issued during the pendency of this case. Of course, what had been noted in the various Intermediate Reports herein was before the Board when those decisions

[3]Although such questions, especially when not alleged in the complaint, may be left for compliance, that or similar reasoning presumably prompted the remand order of December 16, 1957, and the acquiescence of the respondents, just noted. Cf. the following from *N. L. R. B.* v. *Aluminum Tubular Corporation,* F. 2d (C. A. 2), February 19, 1962: "A 'finding' that one company is the 'alter ego' of another is a conclusion of law, not entitled to the benefit of section 10(e) of the National Labor Relations Act. . ."

were issued, as it was when their respective Intermediate Reports were made.

In *The R. C. Mahon Company*[4] case, as the Board pointed out in *Bonnie Lass, infra,* "the operation was still required and being performed, having only been let out on contract." The Board ordered Mahon to reopen the closed departments, resume the operation, and effect full reinstatement with backpay, "no more than administrative alterations" being required.

In *Bonnie Lass Knitting Mills, Inc.,*[5] the employer's business operations were being continued, but on a substantially reduced scale. There again the contrast with the instant situation is clear. The Board ordered reinstatement if full scale or manufacturing operations were resumed; otherwise, backpay until the respective discriminatees secured substantially equivalent employment elsewhere.

In *Barbers Iron Foundry,*[6] the Board in 1960 directed backpay for the period of the temporary closing of the plant.[7] The refusal to order unconditional reinstatement or backpay after the discriminatory permanent closing suggests confirmation *pro tanto* of the original recommendations herein.

In *M. Yoseph Bag Company,*[8] on its finding that the employer "did not cease functioning entirely" when the employees were discriminatorily discharged, the Board directed payment of backpay until the business was sold or until the employer in fact ceased functioning. To the extent that operations were partially continued, the Board may have analogized that situation with the facts in *Mahon*

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[4]118 NLRB 1537.

[5]126 NLRB 1396.

[6]*Id.* at 30.

[7]There was no such condition in the instant case. As pointed out in the first Intermediate Report, Darlington's closing was immediate and orderly as the work in process was completed.

[8]128 NLRB 211.

and *Bonnie Lass*. Again, reinstatement was conditioned upon resumption of operations.

This attempt to distinguish the "tangled underbrush of past cases" among themselves and from the instant case may lead to the impression that the principles involved have been "not always clear . . . consistent or reconcilable."[9] But they are in fact reconcilable and consistent with the recommendations heretofore made in this case with respect to the remedy, and of course the findings of unfair labor practice.

As for the issue of single employer status, further reference may be made to that portion of the Intermediate Report of December 31, 1959,[10] which included an analysis of the *Roy*[11] and *Backman*[12] cases. The criterion of common control of labor policy rather than mere common ownership was applied by the General Counsel in the recent Section 10(1) proceeding involving the Knight Newspapers;[13] and a temporary injunction there issued because, despite admitted common ownership, there did not appear to be common control of labor policy. If common ownership without common control is consistent with the existence of "neutrality" in connection with secondary boycotts, *a fortiori* such ownership without common control does not warrant a finding of single employer status here for purposes of remedy.

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[9] *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 457.

[10] While reference is being made to the Intermediate Report of December 31, 1959, a typographical correction can be made by inserting the words "issues" after "legal" at the end of the first line of footnote 80.

[11] 118 NLRB 286; 251 F. 2d 771 (C. A. 1); 120 NLRB 1016.

[12] 121 NLRB 1229; 266 F. 2d 599 (C. A. 8); 124 NLRB 743.

[13] *Roumell* v. *The Miami Printing Pressmen Local No. 46*, U. S. D. C., Eastern Dist. of Mich., Southern Div'n, October 19, 1961.

In another recent case,[14] the Board has reiterated the factors of controlling ownership, common control generally, and centralized control of labor relations. Again, even where there were separate bargaining units and the labor relations of two corporations were conducted separately, the Board found single employer status; but the labor relations of both companies were there controlled by the same owners, and there was an interchange of employees, equipment, and contract work.[15]

The General Counsel argues an analogy with *Local 138, Operating Engineers (Nassau and Suffolk Contractors' Association, Inc.)*[16] and the direction there that a responsible party, although in the background, remedy unfair labor practices found. The question of control by and responsibility of Deering, Milliken & Co., Inc., has previously been considered in detail even though this analogy was not.

The question of jurisdiction was featured in the recent case of *Peninsular & Occidental Steamship Company.*[17] Going beyond the element of ownership, the Board there held that the chief respondent had full control of the vessel and was in fact the employer of its crew and that other companies were merely its instrumentalities. (The relative significance of ownership and other factors herein have previously been indicated.) Similar findings beyond ownership were made in the leading case there relied on by the Board, *West India Fruit and Steamship Company, Inc.*[18]

Neither with respect to remedy against the original respondent nor single employer status do the Board's recent

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[14] *Amalgamated Lithographers (Miami Post Company),* 130 NLRB 968, 975.

[15] *Aluminum Tubular Corporation,* 130 NLRB 1306.

[16] 123 NLRB 1393, 1405.

[17] 132 NLRB No. 1.

[18] 130 NLRB 343 347-348.

decisions warrant modification of the findings, conclusions, or recommendations heretofore made. Given the opportunity, on the basis of activities by other companies in 1960, to prove a single employer status between Darlington and Deering, Milliken & Co., Inc., in 1956, the General Counsel has not shown that, whatever the present or 1960 connection between Deering, Milliken, Inc., and other companies, that relationship and specifically a single employer status existed in 1956 and that it included Darlington.

Upon the basis of the above findings of fact and upon the entire record at this hearing and in the case, I make the following:

Conclusion of Law[19]

1. Deering, Milliken & Co., Inc. (Deering, Milliken, Inc.) is not responsible for the unfair labor practices of Darlington Manufacturing Company, or to remedy those unfair labor practices.[20]

RECOMMENDATION

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record at this hearing and in the case, I recommend:

That the complaint be dismissed as to Deering, Milliken & Co., Inc.

Dated at Washington, D. C.
March 23, 1962

LLOYD BUCHANAN
LLOYD BUCHANAN
Trial Examiner

[19]The conclusion and recommendation herein supplement those heretofore made to this case.

[20]This conclusion is in the language of the Remand Order of February 15, 1961.